NO. 16-_____

# In the Supreme Court of the United States

COUNTY OF LOS ANGELES,
DEPUTY CHRISTOPHER CONLEY
and DEPUTY JENNIFER PEDERSON,

*Petitioners,*

–v–

ANGEL MENDEZ and JENNIFER LYNN GARCIA,

*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

In a 42 U.S.C. § 1983 action, the district court concluded Los Angeles County Sheriff's Department ("LASD") deputies *did not use excessive force* in shooting the plaintiffs in violation of their Fourth Amendment rights, based upon the factors set forth by this Court in *Graham v. Connor*, 490 U.S. 386 (1989), as the deputies reasonably feared for their safety at the time of the shooting. However, the deputies were nevertheless found liable under the "provocation" rule created by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). This Court has not yet agreed or disagreed with the Ninth Circuit's "provocation" rule, but has noted the doctrine has been "sharply questioned" by other Courts of Appeals. *City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1777 n.4 (2015). The questions presented are:

1. Whether the Ninth Circuit's "provocation" rule should be barred as it conflicts with *Graham v. Connor* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff's Fourth Amendment rights, and has been rejected by other Courts of Appeals?

2. Whether, if the "provocation" rule is upheld, the qualified immunity analysis must be tailored to require a reviewing court to determine whether *every* reasonable officer in the position of the defendant would have known his unlawful conduct would *provoke a violent confrontation* under the specific facts of the case, as this is the conduct for which the Ninth Circuit

imposes constitutional liability despite a *reasonable* use of force under the Fourth Amendment?

3. Whether, in an action brought under 42 U.S.C. § 1983, an incident giving rise to a *reasonable* use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment?

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

### Petitioners

- Deputy Jennifer Pederson, Defendant, Appellant and Cross-Appellee below
- Deputy Christopher Conley, Defendant, Appellant and Cross-Appellee below
- County of Los Angeles, Defendant, Appellant and Cross-Appellee below

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### Respondents

- Angel Mendez, Plaintiff, Appellee and Cross-Appellant below
- Jennifer Lynn Garcia (Mendez), Plaintiff, Appellee and Cross-Appellant below

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There are no corporations involved in this proceeding.

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## OPINIONS BELOW

The March 2, 2016 opinion and judgment of the Ninth Circuit is reported at *Mendez v. County of Los Angeles,* 815 F.3d 1178 (9th Cir. 2016), and reproduced in the Appendix at pages 1a-26a. The district court's November 20, 2013 order denying the motion to amend the judgment or make additional findings was unreported, and is reproduced in the Appendix at pages 27a-51a. The August 27, 2016 district court judgment was not reported, and is reproduced in the Appendix at pages 52a-54a. The district court's Findings of Fact and Conclusions of Law was electronically reported at *Mendez v. County of Los Angeles*, 2013 U.S. Dist. LEXIS 11509 (C.D. Cal. 2013), and is reproduced in the Appendix at pages 55a-136a.

## BASIS FOR JURISDICTION IN THIS COURT

On March 2, 2016, the Ninth Circuit issued its opinion in this matter. (App.1a.) After receiving an extension, on April 16, 2016, Petitioners timely filed a petition for rehearing and rehearing *en banc*. (App.141a-142a.) On April 22, 2016, the Ninth Circuit issued an order directing Respondents to file an answer to the petition for rehearing. (App.139a-140a.) On June 23, 2016, the Ninth Circuit denied Petitioners' petition for rehearing and rehearing *en banc.* (App.137a-138a.) Pursuant to 28 U.S.C. § 1254(1), jurisdiction is conferred upon this Court to review on

writ of certiorari the March 2, 2016 opinion of the Ninth Circuit.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the Respondents pursuant to 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

Respondents allege Petitioners violated their rights under the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV.

## STATEMENT OF THE CASE

### A. District Court Opinion

During a search for a felony parolee-at-large, Petitioners LASD Deputies Christopher Conley and Jennifer Pederson ("Defendants") shot Respondents Angel Mendez and Jennifer Lynn Garcia ("Plaintiffs"). (Appendix ("App.") 69a.) The Plaintiffs were shot while inside a shed in which they were living, located within the backyard of a residential home. (App.59a-60a, 67a-69a.) Plaintiffs sought to recover damages under 42 U.S.C. § 1983 for a violation of their constitutional rights.[1] (App.72a-135a.) Plaintiffs alleged Defendants violated their Fourth Amendment rights based upon

[1] The Plaintiffs also alleged Defendants violated various state law torts, and the district court ruled in favor of Defendants on those claims. (App.130a-135.)

separate theories of liability for excessive force, warrantless entry, and an unlawful entry caused by the officers' failure to "knock and announce" their presence. (App.72a-135a.) A bench trial took place, and the district court made Findings of Fact and Conclusions of Law. (App.55a-136a.)

The district court found that on October 1, 2010, LASD officers from the Target Oriented Policing ("TOP") Team were searching for a parolee-at-large named Ronnie O'Dell, a wanted felony suspect who was categorized as "armed-and-dangerous" by the TOP Team. (App.56a-57a.) There was a warrant out for Mr. O'Dell's arrest. (App.57a.) Mr. O'Dell had evaded prior attempts to apprehend him. (App.57a.)

Following an officer sighting of Mr. O'Dell at a nearby grocery store, another officer, who is not a party to this action, received a confidential tip that a man believed to be Mr. O'Dell was riding a bicycle nearby in front of a private residence owned by woman named Paula Hughes. (App.57a-58a.) There was nothing about the confidential informant's tip which was specific to the Hughes residence as opposed to the rear of the property.[2] (App.93a.) Defendants were assigned to the Community Oriented Policing Unit, but were directed to supplement and assist the TOP Team on the day of the incident. (App.57a-58a.) Prior to officers presenting to the home of Ms. Hughes, the officer who received the confidential tip made an announcement to the group of responding officers that

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[2] The district court found "the officers had probable cause to search for Mr. O'Dell inside the Hughes residence, and Deputy Conley had probable cause to search for Mr. O'Dell inside the shack." (App.93a.)

a man lived in the backyard of the Hughes residence with a pregnant lady. (App.59a.)

Ms. Hughes and Mr. Mendez were high school friends, and Ms. Hughes allowed Mr. Mendez to build a shack on her property in the area behind her home. (App.60a.) Mr. Mendez constructed a windowless shack, which was about seven feet wide, seven feet long and seven feet tall, out of wood and plywood. (App.61.) The shack had a single doorway entrance that faced the Hughes residence, which was about 6 feet tall and 3 feet wide. (App.61a.) Mr. Mendez and Ms. Garcia resided in the shed. (App.60a.)

Mr. Mendez kept a BB gun rifle in the shack in order to shoot rats and pests. (App.62a.) The BB gun rifle closely resembled a small caliber rifle. (App.62a.)

Officers responded to the Hughes residence in search of the felony parolee-at-large. (App.58a-59a.) The officers did not have a search warrant to search the property. (App.63a, 66a.) As other officers approached the front door of the main residence, Defendants were assigned to clear the rear of the property for the officers' safety, should Mr. O'Dell be hiding thereabouts, and to cover the back door of the residence for containment, should Mr. O'Dell try to escape the rear of the Hughes property. (App.58a-59a.)

There was debris throughout the rear of the property, including abandoned automobiles located in the northwest corner. (App.60a.) While clearing the backyard, the Defendants checked three storage sheds between the main residence and a concrete wall bordering the property to the south. (App.65a.) The Defendants "had their guns drawn because they

were searching for Mr. O'Dell, whom they believed to be armed and dangerous." (App.65a.)

While continuing to clear the backyard, the officers came upon the shack at issue, and Deputy Conley opened the door to the shack and pulled back a blue blanket hanging from the top of the door frame, at which time he saw the silhouette of an adult male (Mr. Mendez) holding what appeared to be a rifle. (App.66a-67a.) Mr. Mendez was holding the gun when shot by the deputies because, when he perceived the wooden door being opened, he thought it was Ms. Hughes playing a joke, and he was in the process of moving the rifle so he could put his feet on the floor and sit-up. (App.68a.)

The district court found the barrel of the BB gun rifle would necessarily have been pointed toward Deputy Conley. (App.69a.) The district court found the deputies reasonably believed the BB gun was a firearm rifle, and "*reasonably* believed that the man (Mr. Mendez) holding the firearm rifle (a BB gun rifle) threatened their lives." (App.69a.) Deputy Conley yelled "Gun!" and both Defendants fired their guns in the direction of Mr. Mendez, fearing they would be shot and killed. (App.69a.) Gunshots injured both Plaintiffs, who suffered severe injuries. (App.70a.)

The district court found in favor of Plaintiffs on their 42 U.S.C. § 1983 cause of action. (App.135a.) Notably, after analyzing the factors set forth by this Court in *Graham, the trial court concluded the Plaintiffs did not prove a violation of their Fourth Amendment rights based upon excessive force*. (App. 106a-108a, 135a.) "Deputies Conley and Pederson's use of force was reasonable given their belief that a man

was holding a firearm rifle threatening their lives." (App.108a.)

Nevertheless, the district court determined the Defendants were liable under the Ninth Circuit's "provocation" rule. Under the "provocation" rule, an officer may be held responsible for an otherwise reasonable use of force where the officer intentionally or recklessly provoked a violent confrontation, and the provocation was itself an independent Fourth Amendment violation. (App.109a (citing *Billington v. Smith*, 292 F.3d 1177, 1189-90 (9th Cir. 2002).) "[A]n officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation." (App.111a.) The district court found the "provocation" rule applied based upon the predicate constitutional violations of Plaintiffs' Fourth Amendment rights for a warrantless search of their shed, and the failure of the Defendants to "knock and announce" their presence. (App.109a-122a.) The damages award of approximately four million dollars to Plaintiffs was based upon Defendants' liability under the "provocation" rule.[3] (App. 135a-136a.)

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[3] If the "provocation" rule had not been invoked, the Plaintiffs' recovery would have been limited to only nominal damages. (App.52a-53a, 135a.) Specifically, the district court found the Fourth Amendment violations based upon the warrantless entry by Deputy Conley, and the failure to comply with the "knock and announce" requirement by both Defendants, caused only two dollars in nominal damages to the Plaintiffs. (App.135a.)

## B. Ninth Circuit Published Opinion

First, the Ninth Circuit affirmed the district court's judgment based upon the "provocation" rule. (App.22a.) The Court noted that although the district court found the deputies' shooting of the Plaintiffs was not excessive under *Graham v. Connor,* 490 U.S. 386, the deputies were nevertheless found responsible under the "provocation" doctrine. (App.22a.) The Ninth Circuit's "provocation" rule may only apply where an officer's use of force was preceded by a constitutional violation by the Defendant, who intentionally or recklessly provoked a violent response. (App.22a.)

The Ninth Circuit reversed the district court's finding of a constitutional violation based upon the failure to comply with the "knock and announce" requirement, holding the deputies were entitled to qualified immunity, as the law was not clearly established at the time of the incident that the rule would apply under the circumstances of this case. (App.20a.) However, the Court of Appeals affirmed the district court's finding of a constitutional violation based upon a warrantless entry in violation of the Fourth Amendment. (App.18a.)

Notably, the Ninth Circuit recognized the "provocation" rule required the Defendants to have intentionally or recklessly *provoked a violent confrontation* with the Plaintiffs, and that the provocation was an independent constitutional violation. (App.22a.) "'[W]here an officer intentionally or recklessly *provokes a violent confrontation,* if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly

force.' *Billington v. Smith,* 292 F.3d 1177, 1189 (9th Cir. 2002) (citing *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994)." (App.22a.) Notwithstanding, the Ninth Circuit rejected Defendants' argument that the "provocation" rule could not apply because the Defendants' conduct did not provoke a violent reaction. (App.5a-6a, 22a.) In denying qualified immunity, the Ninth Circuit focused upon the conduct and viewpoint of the *Plaintiffs*, rather than upon the conduct and viewpoint of the *Defendants*, reasoning the Plaintiffs should not be in a worse position simply because the officers' conduct did not provoke a violent response by them. (App.23a.) However, qualified immunity must be analyzed from the viewpoint of the Defendants. The Court of Appeals did not determine whether a reasonable officer in the position of the Defendants *could* have failed to realize their conduct would provoke a violent response.

Moreover, the Ninth Circuit did not determine whether the Defendants "intentionally or recklessly" provoked a violent response, finding the constitutional violation of a warrantless entry in of itself satisfied the requirement. (App.23a-24a.) Thus, the Court of Appeals conflated the necessary showing that an officer acted intentionally or recklessly to provoke a violent response, with proving the predicate, constitutional violation.

Second, the Ninth Circuit stated that even without relying upon the Ninth Circuit's "provocation" doctrine, "the deputies are liable for the shooting under basic notions of proximate cause," based upon the foreseeability or the scope of the risk created by the predicate conduct. (App.24a.) "The deputies are

therefore liable for the shooting as a foreseeable consequence of their unconstitutional entry even though the shooting itself was not unconstitutionally excessive force under the Fourth Amendment." (App.25a.)

The Court of Appeals found "the situation in this case, where Mendez was holding a gun when the *officers barged into the shack unannounced,* was reasonably foreseeable." (App.25a (emphasis added).) "Indeed, here an announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the officers opened the door. Had this procedure been followed, the Mendezes would not have been shot." (App.21a-22a.) The Ninth Circuit made the foregoing findings despite the fact that it found the officers were entitled to qualified immunity from Plaintiffs' claim that Defendants failed to "knock and announce" their presence. (App.20a.)

## REASONS TO GRANT THE PETITION

The Ninth Circuit's "provocation" rule allows a plaintiff to hold a police officer civilly responsible in a 42 U.S.C. § 1983 action for a use of force which has been found *reasonable* under the Fourth Amendment by the trier of fact based upon the totality of the circumstances and the factors set forth by this Court in *Graham v. Connor,* 490 U.S. 386 (1989). This Court has never approved the "provocation" rule. Courts of Appeals should not be permitted to circumvent this Court's precedent regarding the appropriate manner

in which to measure a claim of excessive force/ unreasonable seizure. An officer cannot be liable for damages stemming from a use of force that was reasonable under the Fourth Amendment.

1. Review is necessary because the Ninth Circuit's continued application of the "provocation" rule to find civil liability against a police officer in a 42 U.S.C. § 1983 action based upon excessive force, is a substantial question of federal law which should be, but has not yet been, settled by this Court. Under the doctrine, despite the fact that the court (judge or jury) has determined an officer's use of force was objectively reasonable and did not violate the Fourth Amendment, a police officer is nevertheless liable for a plaintiff's resulting damages if the officer intentionally or recklessly "provoked a violent response" from the plaintiff, necessitating the use of force.

Following trial, the district court specifically found the officers did not use excessive force based upon the totality of the circumstances and the factors set forth in *Graham* when they shot the Plaintiffs, given that they reasonably believed Mr. Mendez aimed a gun at them and reasonably feared for their lives. (App.69a, 108a.) However, the district court concluded, and the Ninth Circuit affirmed, that, despite the *reasonable* use of force under the factors set forth in *Graham,* the deputies were liable for the shooting under the Ninth Circuit's "provocation" rule. In *City & County of San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015), this Court specifically noted that it had not yet ruled upon whether it agreed or disagreed with the Ninth Circuit's "provocation" rule. *Id.* at 1777 n.4. Defendants respectfully submit this is the optimal

case for the Supreme Court to rule on the propriety of the "provocation" rule.

Furthermore, the Ninth Circuit's "provocation" rule has been rejected by a number of other circuits, resulting in inconsistency in the application of federal law with respect to the imposition of liability against a police officer for violating a plaintiff's constitutional right to be free from excessive force. In *Sheehan*, this Court recognized other circuit courts disagreed with the "provocation" rule, stating:

> Our citation to Ninth Circuit cases should not be read to suggest our agreement (or, for that matter, disagreement) with them. *The Ninth Circuit's "provocation" rule, for instance, has been sharply questioned elsewhere*. *See Livermore v. Lubelan*, 476 F. 3d 397, 406-407 (CA6 2007); *see also*, *e.g.*, *Hector v. Watt*, 235 F. 3d 154, 160 (CA3 2001) ("[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause").

*Sheehan,* 135 S.Ct. at 1777 n.4 (emphasis added). Accordingly, as recognized by this Court, the "provocation" doctrine conflicts with decisions by other Courts of Appeals. *Id.*

In addition to the Sixth and Third Circuit cases referenced in the foregoing passage, the Ninth Circuit's decision and application of the "provocation" rule further conflicts with decisions by the Second, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits, which find force must be measured at the time it is applied and not based upon pre-seizure conduct, and the rule

threatens the consistency of federal law. *See Terebesi v. Torreso*, 764 F.3d 217, 235 n.16 (2d Cir. 2014); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005); *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991); *Rockwell v. Brown*, 664 F.3d 985, 992 (5th Cir. 2011), *cert. denied*, 132 S.Ct. 2433 (2012); *Fraire v. Arlington*, 957 F.2d 1268 (5th Cir. 1992), *cert. denied* 506 U.S. 973 (1992); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994); *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995); and *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994). Notably, Defendants are aware of no other circuit which holds an officer responsible for a *reasonable* use of force.

2. If the "provocation" doctrine is upheld, review is further necessary to decide whether an officer's entitlement to qualified immunity should include a determination by the reviewing court that *every* reasonable officer in the position of the defendant would have known his unlawful conduct *would provoke a violent confrontation* with the plaintiff under the specific facts of the case, as this is conduct for which the Ninth Circuit imposes liability despite a *reasonable* use of force under the Fourth Amendment. This Court should resolve the important federal question of how qualified immunity should be analyzed in a case where a plaintiff seeks to hold a police officer liable under the "provocation" rule.

In its decision, the Ninth Circuit affirmed the denial of qualified immunity based solely on its finding that the officers were not entitled to qualified immunity for the predicate constitutional violation of

a warrantless entry into the Plaintiffs' shed. Defendants respectfully submit the Ninth Circuit's analysis was incomplete. Although a defendant must have violated a plaintiff's constitutional rights prior to a use of force for the rule to apply, *not every predicate constitutional violation is likely to* "*provoke a violent response*." Accordingly, in analyzing qualified immunity, assuming a reasonable officer in the position of the defendant would have known his conduct was unlawful in relation to the predicate constitutional violation, a reviewing court must also determine whether a reasonable officer in the position of the defendant *could have failed to realize his conduct would provoke a violent confrontation*.

Furthermore, the law was not clearly established that an officer could be liable under the "provocation" rule when, as here, it is undisputed the Defendants' conduct did not actually provoke a violent response. In fact, in *Duran v. City of Maywood*, 221 F.3d 1127, 1131 (9th Cir. 2000) and *Billington v. Smith*, 292 F.3d 1177, 1189, 1191 (9th Cir. 2002), the Ninth Circuit stated the "provocation" rule does not apply where the evidence does not show the officer's actions should have provoked an armed response. Thus, the Ninth Circuit's decision also directly conflicts with its own prior case law, by imposing liability against the officers despite the lack of a finding by the district court that the Defendants' conduct provoked a violent response or escalated a confrontation with the Plaintiffs.

Moreover, in *Sheehan*, this Court stated "*even if* a controlling circuit precedent" could constitute clearly established federal law, the law was not clearly estab-

lished. *Sheehan,* 35 S.Ct. at 1776 (emphasis added). This Court has not approved of the "provocation" rule, much less established the parameters of the doctrine and the circumstances under which qualified immunity may be denied. In this regard, the Defendants should have been afforded qualified immunity from liability under the "provocation" rule.

3. Review is further warranted to determine whether an incident giving rise to a *reasonable* use of force is an intervening, superseding event, which breaks the chain of causation from an earlier unlawful entry, in an action brought under 42 U.S.C. § 1983. Although the district court only awarded nominal damages on Plaintiffs' warrantless entry claim, the Ninth Circuit found the officers could be liable for the damages caused by the use of force, based upon the entry without a search warrant. Whether damages stemming from a reasonable use of force were proximately caused by a prior, unlawful entry under the Fourth Amendment is a substantial question of federal law for the Supreme Court to answer.

Furthermore, the Ninth Circuit's opinion directly conflicts with decisions by other Courts of Appeals regarding the proper manner in which to determine causation in a 42 U.S.C. § 1983 action. The Third, Fourth, Sixth and Tenth Circuits have held that under general principles of tort and causation, officers who unlawfully enter a home are not liable for harm caused by a reasonable use of force, which is a superseding cause of the harm. *Kane v. Lewis*, 604 Fed.Appx. 229, 234-35 (4th Cir. 2015), *cert. denied*, 136 S.Ct. 358 (2015); *James v. Chavez*, 511 Fed.Appx. 742, 747-48 (10th Cir. 2013); *Lamont v. New Jersey*, 637 F.3d 177,

186 (3d. Cir. 2011); *Estate of Sowards v. City of Trenton*, 125 Fed.Appx. 31, 40-42 (6th Cir. 2005); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2000); and *Bodine v. Warick*, 72 F.3d 393, 400 (3d Cir. 1995). Review should be granted to establish consistency regarding the proper manner to determine causation in 42 U.S.C. § 1983 action, where a plaintiff is injured from a reasonable use of force, which took place following an earlier, unconstitutional entry.

## I. THE NINTH CIRCUIT'S "PROVOCATION" RULE IMPROPERLY MEASURES THE REASONABLENESS OF FORCE UNDER THE FOURTH AMENDMENT, CONFLICTS WITH SUPREME COURT PRECEDENT, AND IS HEAVILY CRITICIZED BY THE OTHER CIRCUITS.

Defendants respectfully submit the Ninth Circuit's "provocation" rule should be overturned. The rule conflicts with Supreme Court precedent regarding the proper manner in which to determine the reasonableness of force in a 42 U.S.C. § 1983 action, and has been rejected by other circuit courts.

### A. The Ninth Circuit's "Provocation" Rule Contravenes *Graham v. Connor* by Holding an Officer Civilly Responsible for a *Reasonable* Use of Force.

Of course, *Graham v. Connor,* 490 U.S. 386 (1989) sets the standard to determine reasonableness in an excessive force/unreasonable seizure claim based upon an alleged violation of a plaintiff's Fourth Amendment rights in an action brought under 42 U.S.C. § 1983. In *Graham,* this Court held reasonableness is measured at the *moment* force is applied, and embodies an

allowance for the fact that officers must make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. *Graham*, 490 U.S. at 396-97. This Court set forth a non-exhaustive list of factors for evaluating the reasonableness of a seizure based upon the totality of the circumstances, including: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect actively resisted arrest or attempted to escape. *Id.* at 396. Nevertheless, courts have found the "most important" factor under *Graham* is whether the suspect posed an immediate threat to the safety of the officers. *George v. Morris*, 736 F.3d 829, 837 (9th Cir. 2013) (citations omitted); *Coles v. Eagle*, 704 F.3d 624, 629 (9th Cir. 2012).

The Ninth Circuit has employed a practice which conflicts with *Graham* by subjecting a police officer to 42 U.S.C. § 1983 liability for a use of force, even though the force used by the officer was reasonable and justified at the moment at which it occurred. Under the Ninth Circuit's "provocation" rule, a plaintiff may recover damages if he can show the officer's reasonable use of force was made necessary by the plaintiff's violent response to the officer's conduct, if the officer intentionally or recklessly provoked the response, and the provocation itself was an independent constitutional violation. *Billington v. Smith*, 292 F.3d 1177, 1189, 1191 (9th Cir. 2002). Defendants respectfully submit that if a use of force is deemed reasonable under the *Graham* factors, including the immediacy of the threat posed to the officer at the time of the incident, an officer should not be liable for damages resulting

from the use of force, irrespective of an earlier constitutional violation.

### B. The Ninth Circuit's "Provocation" Rule Has Been Rejected by, and Conflicts with, Decisions from Other Courts of Appeals.

As noted by this Court, other circuits have sharply questioned the "provocation" rule created by the Ninth Circuit. *City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1777 n.4. A number of circuits reject the contention that circumstances leading up to a fatal shooting, including an unlawful entry by police officers, should be considered in evaluating the reasonableness of an officer's use of deadly force in a 42 U.S.C. § 1983 action, as the excessive force inquiry is confined to whether the officer was in danger *at the moment* of the threat that resulted in the officer's use of force.

In *Hector v. Watt*, 235 F.3d 154 (3d Cir. 2000), the Third Circuit cited to its decision in *Bodine v. Warwick*, 72 F.3d 393 (3d Cir. 1995), and stated:

> In *Bodine*, for example, the plaintiff alleged that police officers illegally entered his house and used excessive force as they tried to arrest him. We held that the illegal entry did not make the officers automatically liable for any injuries caused by the arrest. Invoking proximate causation, we explained that if the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause that limited the officers' liability. For the plaintiff to recover all the damages he sought, we said

> that he had to prove two torts—one for the illegal entry and a second for excessive force.

*Hector*, 235 F.3d at 160. In *Bodine*, the Court posed the following hypothetical, to show why an unlawful entry should not automatically mean the officers are liable for a subsequent use of force:

> Suppose that three police officers go to a suspect's house to execute an arrest warrant and that they improperly enter without knocking and announcing their presence. Once inside, they encounter the suspect, identify themselves, show him the warrant, and tell him that they are placing him under arrest. The suspect, however, breaks away, shoots and kills two of the officers, and is preparing to shoot the third officer when that officer disarms the suspect and in the process injures him. Is the third officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is "no."

*Bodine,* 72 F.3d at 400.

In *Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007), the Sixth Circuit rejected the plaintiff's reliance on the Ninth Circuit's decision in *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), stating:

> Although this circuit has not addressed *Billington* directly, we have rejected such an analysis. The proper approach under Sixth Circuit precedent is to view excessive force

> claims in segments. [Citation.] That is, the court should first identify the "seizure" at issue here and then examine "whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances."

*Livermore*, 476 F.3d at 406 (quoting *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996)); *see also Claybrook v. Birchwell*, 274 F.3d 1098, 1104 (6th Cir. 2001) (the Sixth Circuit's "segmenting" analysis requires the use of deadly force to be determined separately from prior actions taken by the officers).

Also, in *Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996), the Second Circuit rejected the plaintiff's claims that the officer was liable for using excessive force because he created a situation in which the use of deadly force became necessary. *Id.* at 92. Rather, a defendant's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the *moment* he decided to employ deadly force. *Id.*

Moreover, in *Rockwell v. Brown*, 664 F.3d 985 (5th Cir. 2011), *cert. denied*, 132 S.Ct. 2433 (2012), the Fifth Circuit stated the plaintiff's argument that the officer's use of force was unreasonable because a forced entry led to the fatal shooting was unavailing; rather, the force inquiry is confined to whether the officer was in danger at the moment of the threat that resulted in the officer's use of deadly force. *Id.* at 992-93; *see also Fraire v. Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992), *cert. denied* 506 U.S. 973 (1992).

Furthermore, the Seventh Circuit has indicated every force incident is carved into segments and judged

on its own terms to *see* if the officer acted reasonably at each stage. *See Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994); *see also Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (the Fourth Amendment prevents unreasonable seizures, not pre-seizure conduct, regardless of whether it is unreasonable or unjustified).

In *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991), the Fourth Circuit also agreed with the Seventh Circuit's holding that explicit time frame requirements are used to determine reasonableness, which is consistent with the Supreme Court's focus in *Graham* that reasonableness is measured at the very moment when an officer makes the "split-second" judgment. *Id.* at 792. Claims based upon the officer's actions leading up to the time immediately prior to the shooting are irrelevant. *Id.*; *see also Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005 ("the reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis"); *Drewitt v. Pratt*, 999 F.2d 774, 779-80 (4th Cir. 1993).

Likewise, the Eighth Circuit only scrutinizes the seizure itself, and not the events leading up to the seizure. *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). In *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995), the Eighth Circuit rejected the plaintiff's argument that the officers' conduct prior to the seizure caused the circumstances which ultimately led to the need to use deadly force, as such an analysis violated *Graham. Id.* at 648.

In *Menuel v. City of Atlanta*, 25 F.3d 990 (11th Cir. 1994), the Eleventh Circuit relied upon the Seventh Circuit's decision in *Plakas* and stated the time-

frame is a crucial aspect of excessive force cases. *Menuel,* 25 F.3d at 997 (citations omitted).

Conversely, in *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001), the Tenth Circuit indicated a reviewing court may consider whether the officer's own reckless or deliberate conduct during the seizure unreasonably created the need to use such force, but *the primary focus of the inquiry remains on whether the officer was in danger at the exact moment of the threat of force*. *Id.* (citations omitted). In *Young v. City of Providence*, 404 F.3d 4 (1st Cir. 2005), the Court of Appeals stated the rule in the First Circuit was that once it is clear that a seizure has occurred, "the court should examine the actions of the government officials leading up to the seizure"; thus, an officer's actions need not be examined solely at the moment of the shooting. *Id.* at 22. The Court of Appeals noted the various circuits have taken conflicting positions on the manner in which conduct leading up to a challenged shooting should be weighed in an excessive force case, with the Fourth Circuit finding pre-shooting conduct is generally not relevant and is inadmissible. *Id.* at 22 n.12.

As demonstrated, the Courts of Appeals are in conflict regarding the proper manner in which to measure excessive force claims. The majority of circuits do not consider pre-seizure conduct in analyzing the totality of the circumstances regarding the reasonableness of force used by a police officer, as force must be measured at the moment it occurs. While the Tenth and First Circuits allow pre-seizure conduct to be considered as *one of the factors* in analyzing the reasonableness of force under the totality of the

circumstances, Defendants are aware of no other circuit court which holds an officer civilly responsible for damages caused by a use of force the trier of fact has found to be *reasonable* under the Fourth Amendment, based upon the totality of the circumstances.

### C. The "Provocation" Rule Puts the Lives of Officers at Risk.

The "provocation" rule puts officers' lives at risk by holding them civilly responsible for a *reasonable* use of force. In this regard, the rule encourages officers to refrain from self-defense at the threat of violence, or else be subject to liability in a courtroom. The doctrine forces police officers to be constitutional scholars, analyzing whether his or her prior conduct violated a constitutional right of a person *threatening the officer with violence*, during the split-second moment during which the officer must make a decision regarding whether to defend himself or herself from harm.

## II. AN OFFICER SHOULD BE ENTITLED TO QUALIFIED IMMUNITY FROM THE "PROVOCATION" RULE UNLESS *EVERY* REASONABLE OFFICER WOULD HAVE KNOWN HIS UNCONSTITUTIONAL CONDUCT WOULD *PROVOKE A VIOLENT CONFRONTATION UNDER THE SPECIFIC FACTS OF THE CASE.*

The law is well-established that an officer is entitled to qualified immunity in a 42 U.S.C. § 1983 action where: (1) the facts do not show a violation of a constitutional right; or (2) the constitutional right was not "clearly established" by law at the time of the incident, such that "it would be clear to a reasonable officer that his conduct was unlawful in

the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Indeed, qualified immunity may only be denied where *every* reasonable officer would have acted differently. *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012); *see also Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (a law enforcement officer is entitled to qualified immunity if a reasonable officer in his position *could* have believed that his conduct was lawful). Whether a right is clearly established is not determined as a broad proposition of law, but is based upon the specific context of the particularized case and the circumstances facing the defendant. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

Under the Ninth Circuit's "provocation" rule, there are *two* components that must be satisfied before the doctrine may apply: (1) *an officer intentionally or recklessly provokes a violent confrontation*; and (2) the provocation is an independent Fourth Amendment violation. *George v. Morris*, 736 F.3d 829, 837 n.14 (9th Cir. 2013); *Billington v. Smith*, 292 F.3d 1177, 1190-90 (9th Cir. 2002); *Duran v. City of Maywood,* 221 F.3d 1127, 1131 (9th Cir. 2000) (the defendant's conduct must have caused an *escalation* which led to the use of force).

The "provocation" rule was originally developed in *Alexander v. City & County of San Francisco,* 29 F.3d 1355 (9th Cir. 1994). In that case, the Ninth Circuit held liability for excessive force could be based upon the manner in which a SWAT team stormed and forcibly entered the home of a mentally unstable, elderly gentleman, including using a battering ram to

break down his door, which led to a violent confrontation inside the home. *Id.* at 3158, 1366. Liability was premised upon "using unreasonable force to enter the house." *Billington*, 292 F.3d at 1188 (citations omitted). Subsequently, in *Duran*, the Court stated that for *Alexander* to apply, the officer's actions in approaching the plaintiff or decedent must be "excessive and unreasonable," and that such conduct by the defendant must have "*caused an escalation that led to the shooting*." *Duran*, 221 F.3d at 1131 (emphasis added). The evidence must show the officer's actions "should have *provoked* an armed response." *Billington*, 292 F.3d at 1189 (citations omitted).

Subsequently, in *Billington*, 292 F.3d 1188, the Ninth Circuit stated: "We read *Alexander*, as limited by *Duran*, to hold that where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Billington*, 292 F.3d at 1189. The Ninth Circuit has never eliminated the requirement that the defendant's conduct must have *provoked a violent response*, for the "provocation" rule to apply. Thus, in analyzing qualified immunity, assuming a reasonable officer in the position of the defendant would have known his conduct was unlawful in relation to the predicate constitutional violation, a reviewing court must *also* determine whether a reasonable officer in the position of the defendant *could have failed to realize his conduct would provoke a violent response*, as this is the conduct for which the Ninth Circuit imposes constitutional liability despite a *reasonable* use of force under the Fourth Amendment.

In other words, not every predicate constitutional violation by a police officer should reasonably be expected to lead to a violent confrontation. For example, similar to the scenario noted in *Bodine v. Warwick*, 72 F.3d 393 (3d Cir. 1995), consider a situation where an officer fails to comply with the "knock and announce" requirement and improperly steps into the entryway of a home. The officer calmly shows his badge to the occupants and states, in a non-threatening manner, that he was there for some lawful purpose. If an occupant within the home retrieved a gun and began shooting at the officer, the officer would be entitled to shoot back, despite his unconstitutional entry into the home. As another example, an officer unlawfully conducting a warrantless search for contraband of an unoccupied outbuilding within the curtilage of a home may have committed a constitutional violation, but would not reasonably expect his conduct to provoke a violent confrontation, necessitating the need for force. Under the foregoing examples, the officer should be entitled to qualified immunity from any attempt to impose liability under the "provocation" rule.

In this case, the Ninth Circuit erroneously denied qualified immunity to the Defendants from plaintiffs' claim under the "provocation" doctrine. The Court of Appeals analyzed only whether the Defendants were entitled to qualified immunity for the predicate constitutional violation of the warrantless entry of the shed. "[O]ur determination that the deputies are not entitled to qualified immunity on the warrantless entry claim necessarily indicates that they acted recklessly or intentionally with respect to Mendez's rights." (App.24-25.) The Court of Appeals did not sepa-

rately also consider whether every reasonable officer in the position of the Defendants would have believed their conduct was likely *to provoke a violent response*. Thus, Defendants respectfully submit the qualified immunity analysis was incomplete.

Indeed, it is undisputed the Defendants' conduct did not, in fact, "provoke a violent response" by the Plaintiffs. The Ninth Circuit found liability anyway, as it believed the Plaintiffs should not be in a worse position simply because the officers' conduct did not provoke a violent response by them. (App.22a-23a.) However, qualified immunity must be determined from the *officers' viewpoint*, not the Plaintiffs. From the Defendants' viewpoint, *they had no interaction with the Plaintiffs prior to the use of force*, such that they would know their conduct was *escalating* any volatile situation. Rather, the officers opened the door to the shack, located within the backyard of the main residence, while searching for a felony parolee-at-large, and had not even entered the threshold of the shed, before reasonable force had to be used. A reasonable officer in Defendants' position *could* have believed their conduct prior to the seizure was not likely to lead to a violent confrontation with the Plaintiffs.

The Ninth Circuit found that whether a reasonable officer in the position of the Defendants could have failed to recognize the shed was an inhabited dwelling was irrelevant, because the shed was within the curtilage of the main home owned by Ms. Hughes. (App.9a.) However, a reasonable officer would not expect to find residents living in a dilapidated shed, which appeared uninhabitable, within the curtilage of a main home. The issue is

relevant to determining whether a reasonable officer could have failed to recognize that opening the shed door without a warrant would lead to a violent confrontation with residents inside the shed, for the purpose of determining entitlement to qualified immunity.[4]

Nevertheless, assuming *every* reasonable officer would have known the shed was the Plaintiffs' home, not every warrantless entry is likely to provoke a violent confrontation, depending upon the specific context of the case and the circumstances facing the defendant. Here, the district court found Deputy Conley "searched" the shack when he opened the wooden door and pulled back the blue blanket that hung from the top of the doorframe. (App.88a.) Such conduct is not akin to the officers' excessive and unreasonable entry in *Alexander.* A reasonable officer in Deputy Conley's position *could* have failed to realize that opening the door and peering inside a shed, *without actual entry into the shed*, was likely to lead to a violent confrontation. *See Rockwell v. Brown,* 664 F.3d 985, 992 (5th Cir. 2011) (the officer's breach of the door, in of itself, did not cause the need for the force).

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[4] While the Ninth Circuit later stated the officers "should" have been aware the shack was being used as a residence (App.21a.), the Court of Appeals never addressed the crucial question of whether *one* reasonable officer *could* have believed no one was *currently living* in the shed at the time of the incident, based upon its dilapidated appearance, for the purposes of determining qualified immunity. (See photographs at Excerpts of Record 204-05.)

In other words, not *every* reasonable officer in the position of the Defendants would believe that opening the door to a home without a search warrant would cause the residents therein to immediately point a rifle at the officers, without any escalation of a conflict or any interaction between the officers and the occupants therein. For example, in *Pauly v. White*, 814 F.3d 1060 (10th Cir. 2016)*, petition for cert. filed*, (U.S. July 11, 2016) (No. 16-67), the Tenth Circuit considered whether there was a triable issue of fact with respect to the reasonableness of force used by the officers against two brothers in their own home. Following a road rage incident between the brothers and other citizens, the officers approached the home in the dark with flashlights, while it was raining, and the incident ended with the officers shooting one of the brothers. *Id.* at 1065-67. The Tenth Circuit stated the requisite causal connection for 42 U.S.C. § 1983 liability is satisfied if the officers' conduct immediately preceding the shooting was the but-for cause of the decedent's death, *and if the decedent's act of pointing a gun at the officers was not an intervening act that superseded the officers' liability*. *Id.* The officers argued it was *not foreseeable* that the brothers would try to shoot them with a gun, as such a response was wholly disproportionate and unexpected, and amounted to a superseding cause of the events. *Id.* The self-defense of the home allows lethal force by a homeowner when necessary to prevent the commission of a felony in his home. *Id.* The Tenth Circuit noted the interaction between the brothers and the officers, which showed an escalation of violence between them. *Id.* at 1066-67. The Court of Appeals concluded that because it was objectively reasonable *for the officers* to believe the

brothers might think they were intruders, a jury could find that it was foreseeable the brothers would arm themselves to defend their home. *Id.* Conversely, if the homeowners knew it was officers who were approaching, the homeowners would not be expected to raise arms at police in defense of their home. *See James v. Chavez,* 511 Fed.Appx. 742, 747-48 (10th Cir. 2013) (a homeowner may not use deadly force to defend his home from an unlawful entry by the police).

Here, unlike the situation in *Pauly*, the officers can bear no responsibility for failing to identify themselves before opening the door to the shed, as the Ninth Circuit found the Defendants are entitled to qualified immunity from the Plaintiffs' claim based upon the failure to comply with the "knock and announce" requirement. Thus, the issue is whether *one* reasonable officer *could* believe a homeowner would refrain from *shooting him* merely for opening a door a home without a warrant, given that homeowners are not authorized to use lethal force unless they believe an attacker is entering their home to commit a felony therein, and not if they simply believe a police officer is conducting a warrantless search. *See Pauly*, 814 F.3d at 1067.[5] Moreover, in contrast to *Pauly,* there was no interaction with the Plaintiffs prior to the need for force to be used by the Defendants,

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[5] *See also* Cal. Pen. C. § 197(2) (homicide is justifiable when committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein).

and the Defendants' conduct did not "escalate" the situation and did not provoke a violent confrontation with the Plaintiffs (indeed, Mr. Mendez believed it was his friend, Ms. Hughes, who was approaching). As noted, the officers had not even crossed the threshold of the shed prior to seeing the gun aimed at them. As not every reasonable officer would believe their conduct to be provocative of violence under these circumstances, the Defendants are entitled to qualified immunity.

Furthermore, certainly, the law is not *clearly established* that an officer could be liable under the "provocation" rule, if his conduct did not "provoke a violent response." Rather, in *Billington*, the Court of Appeals stated: "*In the case at bar, Hennessey's estate has not established that Detective Smith provoked Hennessey's attack*, much less committed an independent Fourth Amendment violation that provoked it." *Billington,* 292 F.3d at 1191 (emphasis added); *see also Duran*, 221 F.3d at 1131 (defendant's conduct must have caused an *escalation* which led to the use of force). Here, it is undisputed and the district court found Deputy Conley peered inside the shed the very moment Mr. Mendez was moving the BB gun rifle because he believed Ms. Hughes was at the door. (App.69a, 108a.) The Defendants would not have anticipated that the act of police officers simply opening the door to the shack would result in a resident therein aiming a gun at them and, in fact, as in *Billington*, it did not.

In this case, the Ninth Circuit relied upon *Espinosa v. City & County of San Francisco*, 598 F.3d 528 (9th Cir. 2010), *cert. denied*, 132 S.Ct. 1089

(2012), and stated liability may attach even if the officer's conduct has not provoked a violent response. (App.23a.) However, *Espinosa* recites the *Billington* rule that the doctrine may apply where an officer acts intentionally or recklessly to provoke a violent confrontation with the plaintiff. *Espinosa*, 598 F.3d at 538. Moreover, in *Espinosa*, unlike here, the officers actually entered the residence, leading to a confrontation in the attic where the decedent failed to follow instructions, and triable issues of fact were found regarding his behavior which led to the use of force. *Id.* at 533. *Defendants are not aware of any case applying the "provocation" rule when the force was necessitated based purely upon an unfortunate coincidence*: here, Mr. Mendez's movement of the BB gun rifle at the exact moment the officers peered into the shed. Also, even if *Espinosa* could be interpreted as new law which no longer requires the Defendants' actions to have provoked a violent confrontation before the "provocation" rule can apply, it would conflict with *Billington* and *Duran*, and the law would not be "clearly established" for the purposes of determining qualified immunity in any event.

Moreover, this Court has not squarely ruled that controlling circuit precedent could set clearly established law. *See City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1766. This Court has not approved the "provocation" rule, which holds police officers civilly liable for a reasonable use of force if certain criteria are met. Additionally, as indicated above, the law is not clearly established regarding whether an officer's pre-shooting conduct should even be considered in analyzing a use of force, and the majority of circuits hold pre-shooting conduct is not relevant, as force is

measured based upon the circumstances facing the officer at the moment it was applied. Accordingly, Defendants should not be found responsible for damages resulting from a reasonable use of force following a warrantless entry, as not every reasonable officer would believe that the conduct of shooting a resident who was aiming a weapon at him was unconstitutional, even if the officer had entered the home without a search warrant. Thus, the Defendants are entitled to qualified immunity from the Plaintiffs' claims for damages resulting from the use of force, as a matter of law.

## III. AN INCIDENT GIVING RISE TO A REASONABLE USE OF FORCE IS AN INTERVENING, SUPERSEDING EVENT, WHICH BREAKS THE CHAIN OF CAUSATION FROM AN EARLIER UNLAWFUL ENTRY IN AN ACTION BROUGHT UNDER 42 U.S.C. § 1983.

The law is well-established that to prevail in an action brought under 42 U.S.C. § 1983, the plaintiff must prove the defendant's conduct was the proximate cause of the constitutional injury. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 599-600 (1989); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996) (a plaintiff in a 42 U.S.C. § 1983 action must prove but-for *and* proximate causation).

### A. Causation in a 42 U.S.C. § 1983 Action Is a Substantial Issue of Federal Law Which Should Be Settled by This Court.

Whether conduct giving rise to a *reasonable* use of force breaks the chain of causation in a 42 U.S.C. § 1983 action in relation to an earlier, unlawful entry under the Fourth Amendment, is a substantial question

for this Court to answer. In its decision, the Ninth Circuit found that, aside from the provocation theory, the shooting damages may be upheld as proximately caused by the warrantless entry. (App.24a.) However, if the "provocation" doctrine did not apply, the circumstance requiring the officers to use deadly force, *i.e.*, observing what appeared to be a rifle pointed directly at them, was a superseding incident following the warrantless entry, breaking the chain of causation.

### B. The Ninth Circuit's Decision Directly Conflicts with Decisions by Other Circuit Courts.

The Ninth Circuit's decision indicating the Defendants can be held liable for the shooting based upon proximate causation stemming from the predicate conduct of the earlier, unlawful entry, directly conflicts with decisions by the other circuit courts. *Kane v. Lewis*, 604 Fed.Appx. 229, 234-35 (4th Cir. 2015), *cert. denied*, 136 S.Ct. 358 (2015) (officers who unlawfully enter a home are not liable for harm caused by the reasonable use of force, which is a superseding cause of the harm) (citations omitted); *James v. Chavez,* 511 Fed.Appx. 742, 750 (10th Cir. 2013) (even if actions of officer in unlawfully entering home were a but-for cause of the suspect's conduct of trying to shoot the officer, the suspect's conduct was a superseding cause of death); *Lamont v. New Jersey*, 637 F.3d 177, 186 (3d. Cir. 2011) ("as long as 'the officer['s] use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be a [superseding] cause that limited the officer['s] liability.'"); *Estate of Sowards v. City of Trenton*, 125 Fed.Appx. 31, 40-42 (6th Cir. 2005) (irrespective of a

warrantless entry, damages could not be awarded against officers for shooting the decedent, where officers reasonably feared for their safety); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2000) (if the officers' use of force was *reasonable* given the plaintiff's acts, then despite the illegal entry, causation cannot be established); and *Bodine v. Warick*, 72 F.3d 393, 400 (3d Cir. 1995) (damages stemming from an unlawful entry *do not* include damages resulting from a *reasonable* use of force based upon principles of proximate causation, as the event giving rise to the *reasonable* use of force is a "superseding cause").

Defendants respectfully submit that damages stemming from a warrantless search do not encompass damages stemming from a subsequent, *reasonable* seizure.

## CONCLUSION

Based upon the foregoing, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 16, 2016

## APPENDIX TABLE OF CONTENTS

## OPINION OF THE NINTH CIRCUIT (MARCH 2, 2016)

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ANGEL MENDEZ; JENNIFER LYNN GARCIA,

*Plaintiffs-Appellees/*
*Cross-Appellants*,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

*Defendants*,

and

CHRISTOPHER CONLEY, Deputy;
JENNIFER PEDERSON,

*Defendants-Appellants/*
*Cross-Appellees*.

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Nos. 13-56686, 13-57072

D.C. No. 2:11-cv-04771 MWF-PJW

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Before: Ronald M. GOULD and Marsha S. BERZON, Circuit Judges, and George Caram STEEH III,* Senior District Judge.

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GOULD, Circuit Judge:

While participating in a warrantless raid of a house, Los Angeles County Sheriff's Department deputies Christopher Conley and Jennifer Pederson entered the backyard, opened the door to a wooden shack, and shot Angel and Jennifer Mendez, a homeless couple who resided in the shack. After a bench trial, the district court held that the deputies violated the Fourth Amendment knock-and-announce requirement and prohibition on warrantless searches, finding that no exigent circumstances applied. The district court denied the deputies' bid for qualified immunity and awarded the Mendezes damages.

The deputies argue on appeal that the district court erred by denying their qualified immunity defense. The Mendezes cross-appeal the district court's conclusion that the deputies had probable cause to believe that a wanted parolee was hiding in the shack when the deputies searched it. We affirm the district court's conclusion that the deputies were not entitled to qualified immunity for their warrantless entry, and we hold that the district court properly awarded damages for the shooting that followed. Given this disposition, the cross-appeal is dismissed as moot. We reverse, however, the district court's determination

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* The Honorable George Caram Steeh III, Senior District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

that the deputies were not entitled to qualified immunity on the knock-and-announce claim, and we remand for the district court to vacate the nominal damages for that claim.

## I

Because this case involves the deputies' renewed assertion of qualified immunity after judgment, we recite the following facts in the light most favorable to the nonmoving parties and the factfinder's verdict. *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 452-53 (9th Cir. 2013).

In October 2010, Deputies Christopher Conley and Jennifer Pederson were part of a team of twelve police officers that responded to a call from a fellow officer who believed he had spotted a wanted parolee named Ronnie O'Dell entering a grocery store. O'Dell had been classified as armed and dangerous by a local police team, although that classification was "standard" for all parolees-at-large without regard to individual circumstances. Before that day, "Conley and Pederson did not have any information regarding Mr. O'Dell." Conley testified that at the time of the search he knew nothing about O'Dell's "criminal past" and that he didn't recall being given information that O'Dell was armed and dangerous, and Pederson testified that the only information she was given about O'Dell was that he was a parolee-at-large.[1] The officers searched the grocery store for O'Dell but

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[1] Pederson also stated, in response to a leading question, that she was shown a "flyer of sorts" containing a picture of O'Dell and information about O'Dell's criminal history, but she did not testify what the flyer described.

did not find him. The officers then met behind the store to debrief.

During this debriefing, another deputy, Claudia Rissling, received a tip from a confidential informant that a man fitting O'Dell's description was riding a bicycle in front of a residence owned by a woman named Paula Hughes. The officers "developed a plan" in which some officers would proceed to the Hughes house, but because "the officers believed that there was a possibility that Mr. O'Dell already had left the Hughes residence," others would proceed to a different house on the same street. Conley and Pederson were "assigned to clear the rear of the Hughes property for the officers' safety . . . and cover the back door of the Hughes residence for containment." The officers were told that "a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez)."[2] Pederson heard that announcement, but Conley testified that he did not recall it.[3]

Conley and Pederson arrived at the Hughes residence along with three other officers. The officers did not have a search warrant to enter Hughes's property. Conley and Pederson were directed "to proceed to the back of the Hughes residence through the south gate." Once in the backyard, the deputies encountered three storage sheds and opened each of them, finding nothing.

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[2] Mr. Mendez was a high school friend of Hughes, and Hughes allowed him to construct and live in a shack in her backyard. The Mendezes had been living there for about ten months.

[3] The district court found that "[e]ither he did not recall the announcement at trial or he unreasonably failed to pay attention when the announcement was made."

During this time, other officers (led by Sergeant Gregory Minster) banged on the security screen outside Hughes's front door and asked Hughes to open the door. Speaking through the door, Hughes asked the officers whether they had a warrant, and she refused to open the door after being told they did not. Minster then heard someone running inside the residence, who he assumed was O'Dell. The officers retrieved a pick and ram to bust open Hughes's door, at which point Hughes opened the front door. Hughes was pushed to the ground, handcuffed, and placed in the backseat of a patrol car. The officers did not find anyone in the house.

Pederson then met up with Minster and told him, "I'm going [to] go ahead and clear the backyard," and Minster approved. Conley and Pederson then proceeded through the backyard toward a 7′ x 7′ x 7′ shack made of wood and plywood. The shack was surrounded by an air conditioning unit, electric cord, water hose, clothes locker (which may have been open), clothes, and other belongings. The deputies did not knock and announce their presence at the shack, and Conley "did not feel threatened." Approaching the shack from the side, Conley opened the wooden door and pulled back a blue blanket used as a curtain to insulate the shack. The deputies then saw the silhouette of an adult male holding what appeared to be a rifle pointed at them. Conley yelled "Gun!" and both deputies fired fifteen shots in total. Other nearby officers ran back toward the shots, and one officer shot and killed a dog.

The tragedy is that in fact, Mendez was holding only a BB gun that he kept by his bed to shoot rats that entered the shack; as the door was opening, he

was in the process of moving the BB gun so he could sit up in bed. The district court found that the BB gun was pointed at the deputies, although the witnesses' testimony on that point was conflicting and the court recognized that Mendez may not have intended the gun to point that direction while he was getting up. Both Mendezes were injured by the shooting. Mr. Mendez required amputation of his right leg below the knee, and Ms. Mendez was shot in the back.

The Mendezes sued Conley and Pederson under 42 U.S.C. § 1983, alleging a violation of their Fourth Amendment rights. After a bench trial, the district court held that the deputies' warrantless entry into the shack was a Fourth Amendment search and was not justified by exigent circumstances or another exception to the warrant requirement. The district court also held that the deputies violated the Fourth Amendment knock-and-announce rule. The court concluded that given Conley's reasonably mistaken fear upon seeing Mendez's BB gun, the deputies did not use excessive force when shooting the Mendezes, *see Graham v. Connor*, 490 U.S. 386 (1989), but the deputies were liable for the shooting under our circuit's provocation rule articulated in *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). The court also held that its conclusions in each respect were supported by clearly established law and that the officers were not entitled to qualified immunity. The Mendezes were awarded roughly $4 million in damages for the shooting, nominal damages of $1 each for the unreasonable search and the knock-and-announce violation, and attorneys' fees. The deputies filed a notice of appeal, as well as a motion to amend the judgment arguing that the district court erred in

denying qualified immunity. The district court denied the motion, and the deputies filed a second notice of appeal as to that decision. The Mendezes filed a cross-appeal challenging aspects of the district court's factfinding in case we were inclined to grant qualified immunity on the facts as found by the district court.[4]

## II

We review de novo the district court's post-trial denial of qualified immunity, construing the facts in the light most favorable to the factfinder's verdict and the nonmoving parties. *Cal. Highway Patrol*, 712 F.3d at 452-53. The court's factual findings are reviewed for clear error. *Resilient Floor Covering Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1088 (9th Cir. 2015).

Law enforcement officers are entitled to qualified immunity from damages unless they violate a constitutional right that "was clearly established at the time of the alleged misconduct." *Ford v. City of Yakima*, 706 F.3d 1188, 1192 (9th Cir. 2013) (citations omitted). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). But "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). "[T]he salient question . . . is whether the state of the law" at the time of the events (here, October 2010) gave the deputies "fair warning" that

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[4] The Mendezes state that they waive their cross-appeal if we affirm the district court's award of monetary damages for the shooting.

their conduct was unconstitutional. *Id.* In other words, an officer is entitled to qualified immunity unless existing case law "*squarely governs* the case here." *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)).

## III

### A

We start by analyzing the legality of the deputies' entry into the wooden shack. The deputies first argue that they did not "search" the shack within the meaning of the Fourth Amendment when Conley opened the door.

In 2010, the law was clearly established that a "search" under the Fourth Amendment occurs when the government invades an area in which a person has a "reasonable expectation of privacy." *United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2005) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). This includes the "area immediately adjacent to a home," known as the "curtilage." *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010) (citation omitted). Four factors used to determine whether an area lies within the curtilage are "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* (quoting *United States v. Dunn*, 480 U.S. 294, 301 (1987)).

The deputies contend that not every reasonable officer would have assumed that this "dilapidated" shack was a dwelling. This assertion is irrelevant, as it erroneously assumes that the Fourth Amendment applies only to residences. *See Dunn*, 480 U.S. at 307-08 ("[T]he general rule is that the curtilage includes all outbuildings used in connection with a residence, such as garages, sheds, and barns connected with and in close vicinity of the residence.") (citation and internal alterations omitted); *United States v. Johnson*, 256 F.3d 895, 898 (9th Cir. 2001) (en banc) (holding that a shed may be protected under the Fourth Amendment and remanding for district court to answer the question in first instance). In *Struckman*, we held that a "backyard—a small, enclosed yard adjacent to a home in a residential neighborhood—is unquestionably such a 'clearly marked' area 'to which the activity of home life extends.'" 603 F.3d at 739 (citation omitted).

In this case, the trial court found that the shack was thirty feet from the house; it "was not within the fence that enclosed the grassy backyard area" but "was located in the dirt-surface area that was part of the rear of the Hughes property" and could not be observed, let alone entered, "without passing through the south gate and entering the rear of the Hughes property." These facts support a finding that the shack was in the curtilage. Therefore, it was clearly established under *Struckman* and *Dunn* that the deputies undertook a search within the meaning of the Fourth Amendment by entering the rear of Hughes's property through a gate and by further opening the door to the shack in the curtilage behind the house. The deputies' citations to cases involving

"abandoned property" are inapposite because even if the shack was "dilapidated," the officers knew that Hughes lived in the house, and the shack was very clearly in the curtilage of the house.

The district court correctly determined that the deputies conducted a search within the meaning of the Fourth Amendment under clearly established law.

## B

The deputies next argue that they are entitled to qualified immunity because a reasonable officer could have thought that exigent circumstances justified the search.

A warrantless search "is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (citing *Kentucky v. King*, 563 U.S. 452, 459-62 (2011)). The exigent circumstances exception encompasses situations in which police enter without a warrant "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury," while "in hot pursuit of a fleeing suspect," or "to prevent the imminent destruction of evidence." *King*, 563 U.S. at 460 (citations omitted) (collecting cases).

The deputies primarily argue that "[a]n officer may enter a third party's home to effectuate an arrest warrant if he has probable cause or a reason to believe the suspect is within, and exigent circumstances support entry without a search warrant." Although the question is quite debatable, we will assume without deciding that the officers were not "plainly incompetent" in concluding they had probable cause to believe that O'Dell was in the shack behind Hughes's

house. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013).[5] Even with probable cause, clearly established law indicates the unlawfulness of the deputies' entry into the shack in this case.

As the Supreme Court held in *Steagald v. United States*, 451 U.S. 204 (1981), exigent circumstances to enter a home do not exist merely because the police know the location of a fugitive, even if they possess an arrest warrant for that person. *Id.* at 211-12. In *Steagald*, the police received a tip from a confidential informant regarding the location of "a federal fugitive wanted on drug charges." *Id.* at 206. The officers executed an arrest warrant at that location two days later, but the Court held that the search-warrantless entry could not be justified absent exigent circumstances. *Id.* at 211-12. The Court rejected the view that "a search warrant is not required in such situations if the police have an arrest warrant and reason to believe that the person to be arrested is within the home to be searched." *Id.* at 207 n.3. *Steagald* establishes that in this case, the fact that the deputies suspected O'Dell to be in the shack was not, by itself, sufficient to justify the warrantless search.

Although the deputies do not use the phrase "hot pursuit," their exigency argument seems to be premised

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[5] To mention just one consideration, O'Dell was supposedly spotted riding a bicycle in front of Hughes' house. Unless he was riding in circles, he would have passed the house before the officers arrived. The original group of officers recognized this, as some of them went to another house to look for O'Dell. But we have no reason to further address the probable cause question, as we may affirm while assuming the district court's probable cause predicate.

on that doctrine.[6] The hot pursuit exception typically encompasses situations in which police officers begin an arrest in a public place but the suspect then escapes to a private place. *United States v. Santana*, 427 U.S. 38, 42-43 (1976). In *Warden v. Hayden*, 387 U.S. 294 (1967), the Supreme Court upheld a warrantless entry into a home when "police were informed that an armed robbery had taken place, and that the suspect had entered [the home] less than five minutes before they reached it." *Id.* at 298. By contrast, the Court concluded in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), that the state's hot pursuit argument was "unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime." *Id.* at 753.

As a preliminary matter, a police officer spotting O'Dell, a wanted parole-violator, outside of a grocery store does not appear to qualify as pursuit from "the scene of a crime" as in *Warden* or *Welsh*. But even assuming the hot pursuit doctrine applies, *Welsh* explains why the deputies here are not entitled to qualified immunity. In *Welsh*, a witness "observed a car being driven erratically" and called the police, but the driver abandoned his car and "walked away from the scene." 466 U.S. at 742. Police arrived "[a] few minutes later" and, after determining that the owner of the car was Welsh, the police walked to Welsh's residence "a short distance from the scene." *Id.* at 742-43. Without securing a warrant or consent, the

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[6] Indeed, the other three possibilities listed in *King*—that officers entered to render emergency assistance to an injured occupant, to protect an occupant from imminent injury, or to prevent the imminent destruction of evidence, *King*, 563 U.S. at 460—do not fit the circumstances presented here.

police entered and arrested Welsh. *Id.* at 743. The Court held that the entry was not valid under the hot pursuit doctrine because "there was no immediate or continuous pursuit of the petitioner from the scene of a crime." *Id.* at 753.

Our court, sitting en banc, applied *Welsh* to a situation in which police officers broke into a fenced yard in search of a man who escaped while police were arresting him on an outstanding warrant. *Johnson*, 256 F.3d at 898-900, 907-08. We concluded that the search in that case was not "continuous" because the officers had seen the suspect run into the woods but lost sight of him for "over a half hour" before they entered the property at issue. *Id.* at 907–08. "[A]ny other outcome," we cautioned, "renders the concept of 'hot pursuit' meaningless and allows the police to conduct warrantless searches while investigating a suspect's whereabouts." *Id.* at 908.

*Welsh* and *Johnson* squarely govern this case and clearly establish that the hot pursuit doctrine does not justify the deputies' search of the shack. Officer Zeko spotted a person he thought was O'Dell outside the grocery store, but that was the last time any policeman saw him before the search took place, which the record suggests was about one hour later. While the deputies received additional information about O'Dell's possible location from the confidential informant, the location identified was outside Hughes' home, not in the house or the shack behind it. And the officers still did not enter the shack until at least fifteen minutes after learning that O'Dell was outside Hughes' home. Moreover, the officers were far from sure that O'Dell was still (or had ever been) inside Hughes's house—let alone in the shack—as evi-

denced by the fact that they simultaneously searched a house down the street. As in *Welsh*, "there was no immediate or continuous pursuit of the [suspect] from the scene of a crime." 466 U.S. at 753. And as *Johnson* established, *Welsh* applies when the police enter the backyard of a third-party to look for a suspect, even when the suspect has evaded prior attempts at arrest (as O'Dell apparently had). *Johnson*, 256 F.3d at 899-900, 907.

The deputies also try to justify the warrantless entry based on a threat to the officers' safety, urging that O'Dell had been categorized as armed and dangerous. But *Steagald* and *Johnson* both counsel that exigent circumstances do not exist just because the police are dealing with a fugitive, even if he is wanted on serious federal drug charges. *Steagald*, 451 U.S. at 207; *Johnson*, 256 F.3d at 900, 908. Moreover, Conley testified that he was not aware of O'Dell's categorization and did not have any information about O'Dell. Conley explained that his gun was drawn during the search because he "intermittently" used the light on his gun to "see what was inside of the sheds." A search cannot be considered reasonable based on facts that "were unknown to the officer at the time of the intrusion." *Moreno v. Baca*, 431 F.3d 633, 639 (9th Cir. 2005). And even if we assume that Pederson knew about the characterization, the district court found that "the deputies lacked any credible information that the suspect, O'Dell, was in Plaintiffs' shack," which explains why Conley "did not feel threatened" before entering the shed. The deputies correctly assert that the exigent circumstances inquiry is objective, not subjective, *see Anderson v. Creighton*, 483 U.S. 635, 641 (1987), but the information they

had at the time, as confirmed by the conclusions they reached on the scene, is certainly pertinent. We agree with the district court that these facts support a conclusion based on the objective "totality of the circumstances" that the deputies "failed to demonstrate 'specific and articulable facts'" of an exigency.[7]

While the deputies' brief urges that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation," (emphasis in brief) (quoting *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012) (per curiam)), that argument is inconsistent with the fact that the deputies here did not fear imminent violence. We agree with the district court that on this record the deputies did not demonstrate specific and articulable objective facts of an exigency that would meaningfully differentiate this case from clearly established law.

## C

Next, the deputies argue that they could have reasonably assumed that Hughes had consented to a search of the shack. The district court assumed for the sake of analysis that Hughes had authority to consent to a search of the shack, but it reasoned that even if Hughes had allowed the officers to enter her home after officers brought a pick and ram from their patrol car and set the pick against the door, any "consent" was "coerced and consequently invalid."

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[7] The deputies' brief also contends that there was a possibility of ambush arising from other debris in the yard, including parked cars, but even if so, a threat of ambush from other structures would not justify searching the shack.

The deputies argue that because they spoke to another officer (Sergeant Minster) in the Hughes residence before searching the shack, "the defendants would assume the officers were lawfully in the main residence," and they "could reasonably believe the sergeant obtained consent for the search" of the shack.

We are not persuaded by this argument. Given the deputies' position that they lawfully entered the backyard pursuant to an exigent circumstance, it is unclear why the deputies would have thought that the other officers had gained consent to search the house rather than having relied on exigent circumstances as well. And the deputies point to no facts in the record suggesting that they knew Hughes had consented to a search of the shack. The district court correctly determined that the deputies could not have reasonably believed that their search of the shack was consensual.

## D

Finally, the deputies argue that their search of the shack was a lawful protective sweep. We note that there is both a split between the circuits and a split within our circuit as to whether a protective sweep may be done "where officers possess a reasonable suspicion that their safety is at risk, even in the absence of an arrest." *United States v. Torres-Castro*, 470 F.3d 992, 997 (10th Cir. 2006) (collecting cases, including *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000), and *United States v. Garcia*, 997 F.2d 1273, 1282 (9th Cir. 1993)). We assume without deciding that the protective sweep doctrine could apply here. And, although the question is subject to debate, *see* n.5, *supra*, we further assume without deciding that the

deputies' entry into Hughes's house was lawful and a protective sweep could be proper if all other requirements were met.

The district court determined that the officers did not conduct a lawful protective sweep because, even assuming that entry into the Hughes residence was constitutional, the deputies' authority to conduct a protective sweep did not extend to the shack. The court concluded that "there is clearly established law requiring a separate warrant for a separate dwelling, especially when officers are aware of the separate dwelling's existence," so lawful presence in the house did not justify sweeping the shack.

We need not decide whether the district court's qualified immunity analysis was correct, as the deputies' protective sweep argument fails for another reason. To justify a protective sweep, police must identify "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others." *Buie*, 494 U.S. at 327 (internal citations, alterations, and quotation marks omitted). The deputies are incorrect when arguing that even if "there were no exigent circumstances to permit a search of the shed, a reasonable officer could have believed it was proper to search the shed as [part of a] protective sweep." As we have explained, "the protective sweep and exigent circumstances inquiries are related." *United States v. Furrow*, 229 F.3d 805, 811 (9th Cir. 2000), overruled in part on other grounds by Johnson, 256 F.3d at 914. For the same reasons that exigent circumstances did not justify entry into the shack, *see* section III.B., *supra*, the

deputies did not have the requisite suspicion of danger to justify a protective sweep.

For the foregoing reasons, we hold that the deputies violated clearly established Fourth Amendment law when entering the wooden shack without a warrant.

## IV

The district court also concluded that the deputies violated clearly established law because they did not knock-and-announce their presence at the shack before they entered it. We hold that the deputies violated the knock-and-announce rule, but our law in 2010 was not clearly established in this respect. We reverse on this count and remand for the district court to vacate the nominal damages on this claim.

### A

The Fourth Amendment knock-and-announce rule requires officers to announce their presence before they enter a home. *Wilson v. Arkansas*, 514 U.S. 927, 931-34 (1995). Police may be exempt from the requirement, however, when "circumstances present[] a threat of physical violence." *Richards v. Wisconsin*, 520 U.S. 385, 391 (1997) (quoting *Wilson*, 514 U.S. at 936). The district court determined here that because the shack was a separate residence, a fact that the officers knew or should have known, the officers were required to announce their presence at the shack, and that no exception applied for the same reasons that there was no exigency to enter for officer safety.

For the reasons stated above, the district court correctly concluded that no exigency exception

applied. *See also United States v. Granville*, 222 F.3d 1214, 1219 (9th Cir. 2000) (holding that a no-knock entry was not justified because the government did not "cite any specific facts" suggesting that Granville posed a threat to the officers). In *Granville*, we explained, "The government simply relies on generalizations and stereotypes that apply to all drug dealers. Our cases have made clear that generalized fears about how drug dealers usually act or the weapons that they usually keep is not enough to establish exigency." *Id.* Here, the deputies similarly rely on a stereotypical characterization of all parolees-at-large as a threat without pointing to any specific facts known about O'Dell. We conclude that the knock-and-announce exigency exception does not apply.

The officers did, however, announce their presence at Hughes' front door, and we disagree with the district court that existing case law squarely governs the question whether the deputies needed to announce their presence again before entering the shack in the curtilage. We have stated that "officers are not required to announce at [e]very place of entry," *United States v. Valenzuela*, 596 F.2d 1361, 1365 (1979) (citation omitted) (holding that there is no requirement to knock at a garage after properly entering home), and we are not aware of case law clearly establishing that officers must re-announce their presence at a shack in the curtilage, even if it was obvious that it was being used as a residence.

Concluding otherwise, the district court relied on *United States v. Villanueva Magallon*, 43 F. App'x 16 (9th Cir. 2002), which held that the knock-and-announce rule was <u>not</u> violated during the search of

a separate house (#784) on the same property because "Villanueva possessed and controlled both 792 and 784 and, in fact, 784 was not being used as a separate residence by some third, innocent party." *Id.* at 17-18. The district court reasoned that because the shack in this case was being used as a separate residence by a third party, a knock was required. But *Villanueva Magallon* also stated that officers are not required to knock and announce "at each additional point of entry into structures within the curtilage." *Id.* at 18. Because the shack here was in the curtilage, *Villanueva Magallon* does not clearly prohibit the deputies' actions here.

The district court also relied on the proposition in *United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001), that entry into a separate dwelling (in *Cannon*, a rental unit in the rear of the house) requires a separate warrant. This proposition is at too high a level of generality to constitute clearly established law on the question whether police are required to separately knock and announce their presence at a shack in the curtilage. *Mullenix*, 136 S. Ct. at 308 ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality." (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011))).

In the absence of clearly established law that squarely governs the situation here, qualified immunity is appropriate on the knock-and-announce claim. *Id.* at 309. We reverse and remand for the district court to vacate the award of nominal damages on this claim.

## B

To clearly establish the law going forward, *see Pearson v. Callahan*, 555 U.S. 223, 236 (2009), we hold that the deputies violated the Fourth Amendment when they failed to knock at the shack. We do not retreat from the general principle that "officers are not required to announce at [e]very place of entry" within a residence. *Valenzuela*, 596 F.2d at 1365. But we agree with the district court that the deputies here should have been aware that the shack in the backyard was being used as a separate residence. The deputies were told that a couple was living behind the house, and the shack itself was surrounded by an air conditioning unit, electric cord, water hose, and clothes locker. And parallel to the district court's reasoning that a knock should be required for a separate residence just as a warrant is, *see Cannon*, 264 F.3d at 879, we hold that officers must knock and re-announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house.

This rule is supported by the purposes of the knock-and-announce rule, which is designed to protect our privacy and safety within our homes. *United States v. Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994). We have recognized that when officers fail to knock and announce, they risk the "violent confrontations that may occur if occupants of the home mistake law enforcement for intruders." *United States v. Combs*, 394 F.3d 739, 744 (9th Cir. 2005). Indeed, here an announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the

officers opened the door. Had this procedure been followed, the Mendezes would not have been shot.

## V

Although the district court held that the deputies' shooting of the Mendezes was not excessive force under *Graham v. Connor*, 490 U.S. 386 (1989), the district court awarded damages under the provocation doctrine. "[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) (citing *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994)). Here, the district court held that because the officers violated the Fourth Amendment by searching the shack without a warrant, which proximately caused the plaintiffs' injuries, liability was proper. We agree.

The deputies argue first that the provocation doctrine is inapplicable because they did not "provoke a violent response by plaintiffs." In other words, they claim that because Mr. Mendez did not intend to threaten the officers with his gun, he was not responding to the deputies' actions and they did not "provoke" him. We reject this argument. Our case law does not indicate that liability may attach only if the plaintiff acts violently; we simply require that the deputies' unconstitutional conduct "created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable." *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 539 (9th Cir. 2010). And the consequences of the deputies' position make that position unpersuasive.

On their theory, Mendez would ostensibly be entitled to damages if after entry he had intentionally pointed a weapon at the police while shouting "I'll kill you," but here he would be out of luck because he was merely holding a BB gun and didn't intend to threaten the police.

Moreover, this case does not require us to extend the provocation doctrine; we have applied provocation liability in a similar circumstance without requiring the plaintiff to show he acted violently. In *Espinosa*, we found that liability under *Alexander-Billington* was possible when officers entered an attic and shot a man because an officer "believed that he saw something black in [the man's] hand that looked like a gun," even though the suspect "had not brandished a weapon, spoken of a weapon, or threatened to use a weapon" and "in fact, did not have a weapon." 598 F.3d at 533, 538–39. *Espinosa* thus indicates that the provocation doctrine can apply here even though Mendez did not act violently in response to the deputies' entry.

The deputies also argue that they did not intentionally or recklessly violate Mendez's rights, a prerequisite to provocation liability. *See Billington*, 292 F.3d at 1189. But because qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law," *Stanton*, 134 S. Ct. at 5 (citation and internal quotation marks omitted), our determination that the deputies are not entitled to qualified immunity on the warrantless entry claim necessarily indicates that they acted recklessly or intentionally with respect to Mendez's rights. And the record here bears out Conley and Pederson's recklessness—without a reasonable belief of exigent

circumstances, the deputies entered Hughes's property and proceeded to search a shack in an attempt to execute an arrest warrant for a parolee that, at most, may have been on the property, contrary to *Steagald*, 451 U.S. at 211-12, and *Johnson*, 256 F.3d at 907-08. Indeed, the deputies appear to have been simply "conduct[ing] warrantless searches while investigating a suspect's whereabouts," *id.* at 908, which *Johnson* explicitly forbids, *id.*, and *Welsh* prohibits by implication, 466 U.S. at 753.

Finally, even without relying on our circuit's provocation theory, the deputies are liable for the shooting under basic notions of proximate cause.[8] The Supreme Court has emphasized that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). "Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct," and the analysis is designed to "preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (citations omitted).

The district court here, discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008), recognized that when many Americans own firearms "to protect their own homes[, a] startling entry into a bedroom

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[8] This conclusion follows from the Mendezes' argument on cross-appeal that the district court erred by not awarding "reasonably foreseeable" damages jointly on all claims.

will result in tragedy." The court also cited Justice Jackson's decades-old admonition in a case involving a warrantless entry:

> [T]he method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued . . . . Many home-owners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot . . . . But an officer seeing a gun being drawn on him might shoot first.

*McDonald v. United States*, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring). Under these principles, the situation in this case, where Mendez was holding a gun when the officers barged into the shack unnannounced, was reasonably foreseeable. The deputies are therefore liable for the shooting as a foreseeable consequence of their unconstitutional entry even though the shooting itself was not unconstitutionally excessive force under the Fourth Amendment. *See Billington*, 292 F.3d at 1190 ("[I]f an officer's provocative actions are objectively unreasonable under the Fourth Amendment, as in *Alexander*, liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused.").

## VI

Lastly, Pederson argues that she cannot be held liable because she did not search the shack. Pederson testified, however, that after clearing the sheds on

the south side of the property, she told Sergeant Minster that she was "going to check the rest of the yard," including the shack. Minster testified similarly. Pederson also approached the shack with her weapon drawn alongside Conley. It is inconsequential that only Conley opened the door and pulled the blanket back from the doorframe while Pederson stood by—under our case law, Pederson was an "integral participant" in the unlawful search because she was "aware of the decision" to search the shack, she "did not object to it," and she "stood armed behind [Conley] while he" opened the shack door. *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004).

## VII

Because we affirm the district court's conclusion that the deputies are liable for the shooting following their unconstitutional entry, the Mendezes' cross-appeal is waived, and we do not reach the issues therein. The district court judgment is AFFIRMED insofar as it awards damages for the shooting and for the unconstitutional entry. The award of $1 nominal damages for the knock-and-announce violation is REVERSED, and we remand for that nominal damages award to be vacated.

13-56686 is AFFIRMED IN PART and REVERSED IN PART; and 13-57072 is DISMISSED AS MOOT.

# DISTRICT COURT ORDER DENYING MOTION TO AMEND THE JUDGMENT OR MAKE ADDITIONAL FINDINGS OF FACTS (NOVEMBER 20, 2013)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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ANGEL MENDEZ, ET AL.,

v.

COUNTY OF LOS ANGELES, ET AL.,

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Case No. CV-11-04771-MWF (PJWx)

Before: The Honorable Michael W. FITZGERALD, U.S. District Judge.

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This matter is before the Court on Defendants' Motion to Amend the Judgment or Make Additional Findings on Behalf of Defendants County of Los Angeles, Christopher Conley and Jennifer Pederson (the "Motion"), which was filed on September 24, 2013. (Docket No. 266). The Court has reviewed and considered the papers on this Motion, and held a hearing on November 18, 2013. For the reasons stated below, the Court DENIES the Motion.

On September 24, 2013, Defendants filed this Motion. (Docket No. 266). On October 21, 2013, Plaintiffs Angel Mendez and Jennifer Lynn Garcia

filed an Opposition to Defendants' Motion to Amend the Judgment or Make Additional Findings on Behalf of Defendants County of Los Angeles, Christopher Conley and Jennifer Pederson (the "Opposition"). (Docket No. 273). On November 4, 2013, Defendants filed a Reply to Plaintiffs' Opposition to Motion to Amend the Judgment or Make Additional Findings on Behalf of Defendants County of Los Angeles, Christopher Conley and Jennifer Pederson (the "Reply"). (Docket No. 274). On November 6, 2013, Plaintiffs filed an Objection and Request to Strike Defendants' Reply in Support of Motion to Amend Judgment or Make Additional Findings (the "Request"). (Docket No. 277).

Plaintiffs initiated this action by filing a Complaint on June 3, 2011. (Docket No. 1). The Complaint alleged civil rights and tort claims against Defendants, arising from an incident in which Los Angeles Sheriff's Department deputies entered Plaintiffs' dwelling and shot Plaintiffs. (*Id.*). A trial was held before the Court on February 26, 27, 28, March 1, and April 19, 2013. (Docket Nos. 219, 220, 221, 222, 231). On August 13, 2013, the Court entered Findings of Fact and Conclusions of Law (the "Findings"). (Docket No. 250). On August 27, 2013, the Court entered Judgment in this matter. (Docket No. 256).

As reflected in the Findings and the Judgment, the Court found in favor of Plaintiffs on the following claims: (1) the Fourth Amendment unreasonable search claim (based on warrantless entry); (2) the Fourth Amendment unreasonable search claim (based on failure to knock-and-announce); and (3) the Fourth Amendment excessive force claim (based on *Alexander/Billington* provocation).

The Court found in favor of Defendants on the following claims: (1) the Fourth Amendment excessive force claim (based on conduct at the moment at shooting); and (2) the California tort claims.

## I. Request to Strike Reply

Plaintiffs filed the Request, asking that the Court strike the Reply in its entirety because it does not respond to the arguments in the Opposition, but instead, generates new arguments that deprive Plaintiffs of an opportunity to respond. (Docket No. 277).

Plaintiffs are correct that it would be improper to raise new arguments in the Reply. *See Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) ("It is well established in this circuit that "'[t]he general rule is that appellants cannot raise a new issue for the first time in their reply briefs.'"'); *United States v. Boyce*, 148 F. Supp. 2d 1069, 1085 (S.D. Cal. 2001) (stating that because an "argument was not presented in their moving papers," it "should not be considered now, as it is improper for a party to raise a new argument in a reply brief"). However, the Court does not find the Reply to be non-responsive to the Opposition or to raise new arguments.

Therefore, the Court DENIES the Request to strike the Reply in its entirety.

## II. Motion to Amend Judgment or Make Additional Findings

Federal Rule of Civil Procedure 52(b) provides: "[o]n a party's motion filed no later than 28 days after the entry of judgment, the court may amend its

findings—or make additional findings—and may amend the judgment accordingly." Fed. R. Civ. P. 52(b). Rule 59(e) similarly states: "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

The Motion was filed exactly twenty-eight days after the entry of judgment, and thus, was timely.

"Since specific grounds for a motion to amend or alter are not listed in [Rule 52(b)], the district court enjoys considerable discretion in granting or denying the motion" to amend a judgment. *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam) (internal quotation marks omitted). "But amending a judgment after its entry remains 'an extraordinary remedy which should be used sparingly.'" *Id.* (citation omitted). The Ninth Circuit has indicated that a Rule 59(e) motion may be granted if: (1) "necessary to correct manifest errors of law or fact upon which the judgment rests," (2) "necessary to present newly discovered or previously unavailable evidence," (3) "necessary to prevent manifest injustice," or (4) "justified by an intervening change in controlling law." *Id.*

Virtually all of the arguments in the Motion were raised at trial or could have been raised at trial, and on that basis alone the Motion could be denied. Nonetheless, the Court will address Defendants' specific arguments.

### A. Qualified Immunity

Defendants primarily argue that the Court committed manifest legal error in denying qualified immunity to Deputy Conley and Deputy Pederson.

"Qualified immunity protects officers from liability for civil damages where their alleged unconstitutional conduct does not violate a clearly established right." *Ford v. City of Yakima*, 706 F.3d 1188, 1192 (9th Cir. 2013). As stated in the Findings (Findings at 14-15), in determining if qualified immunity existed, the Court must consider two questions: (1) was there a violation of a constitutional right, and (2) was that constitutional right clearly established at the time of the alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "[T]he second question requires the court to ask whether a reasonable officer could have believed that his conduct was lawful." *Dixon. Wallowa County*, 336 F.3d 1013, 1019 (9th Cir. 2003).

#### 1. Qualified Immunity Based on Exigent Circumstances

Defendants argue that the Court erred in denying qualified immunity because a reasonable officer could have believed that the threat posed by the suspect, Ronnie O'Dell, to the deputies' safety, justified a warrantless search based on exigent circumstances and excused compliance with the knock-and-announce requirement. (Mot. at 5-12).

##### a) Objective Reasonable Standard

Defendants first argue that the Court erred in focusing its analysis on Deputy Conley's testimony that he did not feel threatened at the time because

the legal standard does not include a subjective component. (*Id.* at 5). Defendants argue that the legal standard is whether a reasonable officer could reasonably believe that exigent circumstances, based on officer safety risk, justified a warrantless search and non-compliance with the knock-and-announce rule. (*Id.* at 5-6).

Defendants are correct that, in determining, whether exigent circumstances justify a warrantless search, "[t]he relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523 (1987). The specific officer's "subjective beliefs about the search are irrelevant." *Id.*

The Court, however, correctly applied the objective standard in the Findings and analyzed the situation from the perspective of a hypothetical reasonable officer. The Court stated:

> [W]ith respect to officer safety, if [the suspect] was within the shack, he was trapped. There was no apparent threat to officer safety. Tellingly, Deputy Conley testified that, prior to opening the door to the shack, he did not feel threatened. If Mr. O'Dell had been elsewhere on the Hughes property, Defendants have failed to show that a search of the shack was 'imperative' to officer safety. Moreover, the possibility that Mr. O'Dell was in the shack hiding but nobody else would have been in the shack was premised

> on the unreasonable belief that the shack was not a dwelling.

(Findings at 31).

There is only one statement in the above analysis that referenced Deputy Conley's subjective belief that "he did not feel threatened." (*Id.*). However, the Court's analysis was not based on Deputy Conley's belief, but rather on "the totality of the circumstances," which did not demonstrate that the warrantless search was justified by a threat to officer safety. (*Id.*) In the next paragraph in the Findings, the Court explicitly stated: "Rather than second-guess Deputy Conley's conduct with the benefit of hindsight, the Court concludes only that Defendants have failed to demonstrate 'specific and articulable facts' justifying a warrantless search of the shack based on any supposed exigency." (*Id.* at 31-32).

Therefore, the Court does not find that it applied the incorrect legal standard to determine whether a threat to the deputies' safety justified a warrantless search based on exigent circumstances.

#### b) Exigent Circumstances If Suspect Is Trapped

Defendants next argue that the Court erred in concluding that (1) "if [the suspect] was within the shack, he was trapped," and "[t]here was no apparent threat to officer safety," and (2) "[i]f [the suspect] had been elsewhere on the [property], Defendants have failed to show that a search of the shack was 'imperative' to officer safety" (Findings at 31). (Mot. at 10).

Defendants cite to several Ninth Circuit cases in support of the proposition that exigent circumstances

do not disappear if a suspect becomes trapped. However, the cases relied upon by Defendants are inapposite.

Defendants rely on *Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009) for the proposition that the danger posed by a possibly armed suspect does not dissipate simply because the suspect becomes trapped. (Mot. at 8). However, in *Fisher*, the situation did not include a possibly armed suspect. Instead, the suspect, in fact, was armed, threatened to shoot the police, and pointed his firearm at the police. *Fisher*, 558 F.3d at 1073, 1075. The Ninth Circuit thus described the situation as "an armed standoff," *id.* at 1077, which is distinguishable from the present case, in which deputies were conducting a search for a suspect who may or may not have been on Paula Hughes's property and who was categorized as armed and dangerous.

Additionally, the analysis in *Fisher* focused on whether exigent circumstances that existed at the beginning of the armed standoff dissipated over time. The Ninth Circuit concluded that the law enforcement officers were not required to reassess whether exigency persisted throughout the twelve-hour standoff because the "armed standoff was a single Fourth Amendment event, a continuous process of formalizing [the suspect's] arrest." *Id.* at 1077. The analysis in *Fisher* thus requires that exigent circumstances existed at some point during a Fourth Amendment event. Here, however, the Court did not find that exigent circumstances existed initially or at all in the present case. Therefore, the analysis in *Fisher* appears inapposite.

Similarly, Defendants cite to *United States v. Flippin*, 924 F.2d 163 (9th Cir. 1991) for the proposition that if exigent circumstances exist, they do not dissipate

simply because the item at issue had been seized. (Mot. at 8). In *Flippin*, the Ninth Circuit found that even though the officer had already seized the item he was seeking, the officer's subsequent seizure of the suspect's make-up bag was justified based on exigent circumstances that threatened his safety. *Id.* at 167. However, the exigent circumstances in *Flippin* were the suspect's sudden actions: "Flippin had grabbed the bag as [Officer] Martin turned away. When he asked her for the bag, she refused to relinquish it, forcing him to struggle with her until he gained custody of it." *Id.* In the present case, neither Plaintiffs nor any other individuals committed analogous actions to trigger a search of Plaintiffs' shack.

Additionally, Defendants cite to *United States v. Lemus*, 582 F.3d 958 (9th Cir. 2009) to demonstrate that Deputy Conley risked being ambushed, thereby, justifying a search of Plaintiffs' shack. (Mot. at 9, 11). Although *Lemus* dealt with a different warrant exception, "a protective search incident to [an in-home] arrest," *Lemus*, 582 F.3d at 962, the Court will assume that the risk of ambush could potentially exist during a search for a suspect, and thus, justify a warrantless search based on exigent circumstances.

In the context of this action, Defendants argue that if Deputy Conley were to turn around and walk away from Plaintiffs' shack, he could be ambushed by someone emerging from the shack. (Mot. at 9, 11). However, in support of that argument, Defendants point to testimony by Deputy Conley that he could not use some cars in the yard surrounding the shack for cover because those cars also posed a threat, presumably because someone could be hiding in the

cars. (Docket No. 266, Ex. B., p. 86: 13-22). The Court is simply not persuaded that this testimony indicates a risk of being ambushed from someone inside the shack. Later in their Motion, Defendants also requests that the Court amend its finding that "Deputy Conley could have obtained a warrant 'in time'" (Findings at 31), because there was no guarantee that a potential attacker would not have ambushed the officers from the shed. (Mot. at 21). However, because the record does not establish the threat of ambush existed, the Court declines to amend its finding that Deputy Conley could have obtained a warrant in time.

Alternatively, Defendants argue that "[a]t the very least, the law plainly was not clearly established such that every reasonable officer would have believed their safety was not in jeopardy." (Mot. at 11). However, Defendants have not demonstrated this point, since the cases they rely upon are inapposite.

### c) Knock-and-Announce Rule

Defendants additionally argue that the Court erred in finding that that an exception to the knock-and-announce rule was not justified by the potential threat that knocking posed to officer safety. Defendants argue that the knock-and-announce requirement was "clearly excused" because announcing the presence of the officers "presented an extremely dangerous and volatile situation." (Mot. at 12).

As stated in the Court's Findings (Findings at 37): "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime

by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 1421, 137 L. Ed. 2d 615 (1997). The analysis, here, is similar to that above with respect to exigency, since both issues turn on whether an officer could reasonably believe that the circumstances posed a danger to the officers' safety.

In support of their argument, Defendants cite to *United States v. Ramirez*, 770 F.2d 1458 (9th Cir. 1985), as an example in which the no-knock exception was justified by the fact that the suspect was considered armed and dangerous. However, *Ramirez* is distinguishable, first, on the ground that the law enforcement officers had confirmed that the targeted suspects were, in fact, at the location to be searched. *Id.* at 1459 (stating that, before entering the apartment, the law enforcement agents saw the suspects' car in their parking stall, and conducted surveillance confirming "that two men were in the apartment, with the lights on and watching TV").

In contrast, here, the deputies lacked any credible information that the suspect, O'Dell, was in Plaintiffs' shack. During trial, Deputy Conley testified: "I didn't have a specific belief that [Mr. O'Dell] was in fact in there [Plaintiffs' shack]. However, I didn't neglect the fact that he could have been . . . . No. I wouldn't say that I assumed someone was armed and dangerous in there." (Docket No. 266, Ex. B, p. 85: 16-23). Moreover, testimony at trial indicated that O'Dell's classification as armed and dangerous was a standard classification applied to all parolees at large ("P.A.L."). Plaintiffs' expert witness, Roger Clark, testified as following:

> Q: In fact, parolees at large are generally considered to be armed and dangerous, correct?
>
> A: That is–I testified in my deposition that has become a standard statement for all P.A.L. notifications or all P.A.L. notifications or all P.A.L. bulletins. And I've seen that. In fact, I can't think of a single P.A.L. bulletin that does not have that phrase.

(Docket No. 266, Ex. C, p. 15:6-12).

*Ramirez* is further distinguishable in that the danger posed to the officers was heightened by the fact that the suspects' apartment manager "had informed the [suspects] that the FBI was looking for them." *Ramirez*, 770 F.2d at 1461. No analogous factor heightening the risk to officer safety is present, here.

Defendants also cite *United States v. Bynum*, 362 F.3d 574, 582 (9th Cir. 2004) because, there, the Ninth Circuit "stressed that exigent circumstances justify non-compliance with the knock-and-announce rule where the suspect has a gun. (Mot. at 12). *Bynum* "merely confirm[ed] the proposition that the presence of a firearm coupled with evidence that a suspect is willing and able to use the weapon will often justify noncompliance with the knock and announce requirement." 362 F.3d at 582-83. In *Bynum*, less than seven hours before executing a search warrant, an undercover officer had conducted a controlled buy of crack cocaine from the suspect, during which the suspect carried a loaded semi-automatic pistol and acted erratically. *Id.* at 577-78. Therefore, the Ninth Circuit found that the officers' no-knock entry to execute the search warrant was justified by the officers'

knowledge that the suspect had a gun and that, given the suspect's strange behavior at the undercover buy, he might become violent. *Id.* at 582.

In the present case, the suspect, O'Dell, had been categorized as armed and dangerous, but the deputies had no other indication that the suspect was actually present in the shack or armed, as confirmed by Deputy Conley's testimony above. The tip received by the deputies stated only that a man believed to be the suspect was riding a bicycle in front of a private residence. (Findings at 3).

Therefore, Defendants have not presented any arguments or legal authority persuading the Court that its findings and conclusions regarding the no-knock entry constituted manifest legal error.

### 2. Qualified Immunity Based on Protective Sweep Doctrine

Defendants argue that the deputies had legal justification to search the main house, based on exigent circumstances and the fact that its owner, Paula Hughes, was on probation. (Mot. at 12-14). Defendants argue that because the deputies were justified in conducting a search of Ms. Hughes's house, they were justified in conducting a protective sweep of Plaintiff's shack. (*Id.* at 14).

The Court first addresses two preliminary matters.

First, Plaintiffs argue that Defendants never raised the protective sweep argument during litigation, and thus, they should be barred from raising it, here. Plaintiffs are correct that "[a] Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have

been raised earlier in the litigation." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). However, as Defendants point out the deputies repeatedly testified that they were clearing the shack for officer safety reasons. (Reply at 14). Although Defendants did not clearly argue that this testimony supported a protective sweep, as opposed to exigent circumstances, the Court will consider the protective sweep argument because it can be supported by the testimony at trial.

Second, the Court rejects Defendants' argument that a search of Ms. Hughes's house was justified because she was on probation. As Plaintiffs argue, the deputies were unaware that Ms. Hughes was on probation, at the time they entered her home. (Opp. at 13). They did not learn of her probation status until after the search was conducted. (*Id.*). Defendants have not offered any new factual evidence that would justify amending the Court's view on Ms. Hughes's probation status. Therefore, the deputies' initial search cannot be justified as a probation compliance search.

### a) Protective Sweep Doctrine

A protective sweep is "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). "It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* In *Buie*, the Supreme Court distinguished between two types of searches:

> [A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look

> in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

*Id.* at 334.

While some courts understand *Buie* to have authorized two types of protective sweeps, the Ninth Circuit classifies the first search above as a protective search incident to an in-home arrest, and the second search as a protective sweep. *See Lemus*, 582 F.3d at 963 n.2 (classifying a protective search incident to an in-home arrest as a protective sweep would be "contradictory" because it does not require reasonable suspicion). Defendants argue that the deputies were justified in conducting the second type of search described above, a protective sweep, which requires articulable facts that an individual posing a danger is in the area swept. (Mot. at 14-15).

**b) Exigent Circumstances as to Ms. Hughes's House**

The crux of Defendants' argument is that a warrantless search of Ms. Hughes's house (based on exigent circumstances) also served as a legal basis for the deputies to conduct a protective sweep of Plaintiffs' shack. A prerequisite to this argument is that a warrantless search of Ms. Hughes's house was justified because of exigent circumstances. (Mot. at

13). Defendants request that the Court make an additional finding on this issue. (*Id.*).

In the Findings, the Court explicitly declined to rule on this issue because it did not answer whether the deputies were justified in conducting a warrantless search of Plaintiffs' shack. (Findings at 30). Following the Ninth Circuit's guidance in *United States v. Cannon*, 264 F.3d 875 (9th Cir. 2001), the Court found that Plaintiffs' shack was a separate dwelling from Ms. Hughes's home, and thus, a warrantless search of Plaintiffs' shack required a separate exception to the warrant requirement. (Findings at 19-23, 30). As indicated below, the reasoning in *Cannon* still applies. Even if a warrantless search of Ms. Hughes's home was justified based on either exigent circumstances or a protective sweep, this finding would not justify a warrantless search of Plaintiffs' shack. Therefore, for the same reasons stated in the Findings, the Court again declines to reach this issue.

**c) Protective Sweep as to Ms. Hughes's House**

Defendants next argue that the protective sweep doctrine applies to officers performing a search pursuant to a search warrant or exigent circumstances. (Mot. at 15). This argument is premised on the legitimacy of a warrantless search of the main residence.

The courts of appeals disagree on whether a protective sweep can occur outside the context of an arrest. *See* 3A Charles Alan Wright, et al., Fed. Prac. & Proc. Crim. § 677 (4th ed.). Defendants have cited to one case that supports their position. *See United States v. Martins*, 413 F.3d 139, 149-50 (1st Cir. 2005) (finding that because the First Circuit has applied

the protective sweep doctrine to the execution of search warrants, the doctrine should also apply to lawful searches based on exigent circumstances).

Defendants have not pointed to a case holding likewise in this Circuit. But Defendants cite to two Ninth Circuit cases, upholding a protective sweep and a pat-down, respectively, where the officers had obtained consent to enter an apartment. *See United States v. Garcia*, 997 F.2d 1273, 1282 (9th Cir. 1993) (finding a protective sweep proper where officers first gained lawful consent to enter a home); *Flippin*, 924 F.2d at 165 (following a consent entry, no probable cause is needed to pat down for weapons, as long as the pat down is independently justified by reasonable suspicion of a risk to safety). In *Flippin*, the Ninth Circuit stated that the reasoning in *Buie* "plainly implies that, following a consent entry, no probable cause predicate is needed to pat down for weapons, if it is independently justified by a reasonable suspicion that the suspect is armed." *Id.* at 165-66.

Assuming that the reasoning in *Garcia* and *Flippin* would justify a lawful search based on exigent circumstances, the deputies, here, could still only conduct a protective sweep of Ms. Hughes's residence. If exigent circumstances justified a search of Ms. Hughes's property, the deputies were lawfully present only in her dwelling.

Moreover, a protective sweep would require reasonable suspicion that Ms. Hughes's residence harbored an individual posing a danger to the deputies. Defendants notably skipped this step in their argument, and conducted a reasonable suspicion analysis as to Plaintiffs' shack only. (Mot. at 18, 19-21). This omission belies a fatal flaw in Defendants' argument, which is

the conflation of Ms. Hughes's residence and Plaintiffs' shack as a single property for the purposes of the Fourth Amendment warrant requirement.

### d) Extension of Protective Sweep Doctrine to Distinct Dwellings

However, Defendants contend that a protective sweep may extend to distinct dwellings located at a single address. (Mot. at 16-17). This contention is the key aspect of Defendants' argument, as it seemingly gets around the requirement of a separate warrant exception for each separate dwelling.

This part of Defendants' argument relies almost entirely on one case, *Gutierrez v. County of Los Angeles*, No. CV 10-7589-CAS (PLAx), 2013 WL 3821602 (C.D. Cal. July 22, 2013), for the proposition that the scope of a protective sweep extends to separate units and detached dwellings. (Mot. at 16). In *Gutierrez*, officers conducted a probation compliance search of a residence, where they had probable cause to believe a probationer lived. *Id.* at *10. The residence consisted of a main house where Christina and Hector Sr. lived, and a separate, unattached apartment at the back of the main house where Hector Jr. lived. *Id.* at *1. The officers searched both the main house and Hector Jr.'s separate apartment without consent. *Id.* The district court found that the officers' search of Hector Jr.'s separate apartment was justified under the protective sweep doctrine because "the evidence in the record indicates that the deputies were only in Hector Jr.'s separate apartment for a short duration of time," and Plaintiffs did "not identif[y] any evidence in the record that the deputies had to force their way into the unit, or that anything was unnecessarily disturbed inside." *Id.* at *11.

*Gutierrez*, however, can be distinguished in a crucial way. The district court never made a finding that the apartment in *Gutierrez* was a separate dwelling from the main residence. Instead, the court repeatedly referred to the apartment as another "unit" on the property. *See, e.g.*, *Id.* at *2, 11. Accordingly, when considering whether the officers had probable cause to search the apartment, the court relied on the principle that a probation search "is limited to 'those areas of a residence over which the probationer is believed to exercise complete or joint authority.'" *Id.* at *11 (citation omitted). In other words, the court treated the apartment as another area of the residence where the probationer supposedly resided.

In contrast, this Court found that Plaintiffs' shack was a separate dwelling unit (Findings at 19-23) and that Plaintiffs had a reasonable expectation of privacy in the shack (*id.* at 24). This finding was based on numerous facts and a canvass of the pertinent case law. Moreover, this case did not involve an initial probation search as a predicate for the protective sweep.

As a separate dwelling unit, "a separate warrant was required" for the shack. *Cannon*, 264 F.3d at 879. Where a separate warrant is required, a separate exception to the warrant requirement is required. The protective sweep doctrine is simply another exception to the Fourth Amendment's warrant requirement. As such, a protective sweep of Plaintiffs' shack cannot piggyback on the deputies' presumed lawful presence at Ms. Hughes's residence.

Instead, under the logic of Defendants' argument above, a protective sweep of Plaintiffs' shack would be justified by (1) the deputies' lawful presence in Plain-

tiffs' shack, and (2) reasonable suspicion that the shack harbored a dangerous individual. As indicated in the Findings and this Order, Defendants have not demonstrated that the deputies were lawfully present in Plaintiffs' shack.

Because Defendants' argument fails for the above reasons, the Court need not address whether reasonable suspicion justified a protective sweep of the shack (Mot. at 19-21), or whether a protective sweep of the shack required compliance with the knock-and-announce rule (*id.* at 21-22).

Finally, Defendants argue that, at the very least, the law was not clearly established that the deputies could not conduct a protective sweep of the shack. (Mot. at 21). However, in light of *Cannon* and other cases, such as *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), there is clearly established law requiring a separate warrant for a separate dwelling, especially when officers are aware of the separate dwelling's existence. *See, e.g.*, *Garrison*, 480 U.S. at 86-87 (finding that officers "were required to discontinue the search of respondent's apartment as soon as they discovered there were two separate units on the third floor").

### B. Damages Based Upon Force by Provocation

Defendants also argue that because the deputies were in Plaintiffs' shack lawfully based on either the exigent circumstances or protective sweep exceptions, there is no independent Fourth Amendment violation supporting provocation under *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) and *Billington v. Smith*, 292 F.3d 1177, 1188 (9th Cir. 2002) line of cases. (Mot. at 22-23).

However, as demonstrated above, the Court disagrees with Defendants and declines to amend its finding that Deputy Conley violated Plaintiffs' constitutional right to be free from an unreasonable search. (Findings at 32). Accordingly, an independent Fourth Amendment violation supports provocation under the *Alexander/Billington* doctrine. The Court thus declines to amend the damages on this issue.

### C. Different and/or Additional Factual Findings

Defendants ask for seven additional or different factual findings, to some of which the Court already alluded.

As indicated above, Federal Rule of Civil Procedure 52(b) authorizes motions to amend the Court's findings. "Motions under Rule 52(b) are 'designed to correct findings of fact which are central to the ultimate decision; the Rule is not intended to serve as a vehicle for a rehearing.'" *Ollier v. Sweetwater Union High School Dist.*, 858 F. Supp. 2d 1093, 1117 (S.D. Cal. 2012). Similar to motions to amend the judgment, "Rule 52(b) motions are appropriately granted in order to correct manifest errors of law or fact or to address newly discovered evidence or controlling case law." *Id.* "A motion to amend a court's factual and legal findings is properly denied where the proposed additional facts would not affect the outcome of the case or are immaterial to the court's conclusions." *Id.*

First, Defendants request a finding on whether exigent circumstances existed to search Ms. Hughes's house. (Mot. at 23). However, the Court declined to grant this request above because it does not affect

the legal finding as to whether the deputies were justified in searching Plaintiffs' shack.

Second, Defendants appear to ask for a finding that Deputy Conley's testimony demonstrates clear safety concerns. (Mot. at 23-24). This request is vague. The Court cannot determine if Defendants are asking the Court to strike the finding that Deputy Conley did not feel threatened, or whether they are asking the Court to make an affirmative finding that Deputy Conley and other deputies, in fact, felt threatened at the time of the search.

Regardless, the Court disagrees with Defendants' understanding that Deputy Conley's testimony demonstrated "clearly serious officer safety concerns." (Mot. at 24) (emphasis added). Defendants' excerpts from Deputy Conley's testimony indicate that Deputy Conley stated: "I didn't feel threatened at the time. I didn't think I needed assistance. . . . [P]rior to opening the shed, no, I didn't feel threatened." (Docket No. 266, Ex. B, p.89: 12-13, 21-22). Deputy Conley subsequently stated, "if I was to give a knock and notice, then I would feel threatened." (*Id.* at p.90: 4-5). This latter statement, however, does not support a finding that Deputy Conley, in fact, felt threatened. Moreover, with respect to whether the circumstances posed officer safety concerns, the Findings already indicate that the suspect, O'Dell, was a wanted felony suspect, was categorized as armed and dangerous, and had evaded prior attempts to apprehend him. (Findings at 2).

The Court thus declines to accommodate the second request.

Third, Defendants seek an additional finding that Paula Hughes, owner of the main residence, was on probation requiring her consent to search. (Mot. at 24-25). However, the Court has already declined this request, for the reasons stated above.

Fourth, Defendants seek an additional finding that Paula Hughes's house was a known drug trafficking house. (Mot. at 25). However, Defendants have not indicated what evidence supports such a finding. Therefore, the Court does not make this additional finding. Moreover, the phrase itself is too vague.

Fifth, Defendants seek the finding that the evidence did not show that Defendants would or could have seen the hose, cords, and A/C unit in relation to the shed as they were partially covered by tarps, and that the deputies' attention was focused upon finding the parolee-at-large. (Mot. at 25).

However, the evidence doesn't clearly support a finding that it was the tarp that obscured the above items from view. For example, Deputy Conley testified,

> . . . [W]hen we're clearing something, we're looking for threats; so something like a T-shirt, I wouldn't key in on and pay attention to the T-shirt because there would be a threat somewhere else that I'm missing.
>
> [ . . . ]
>
> I don't remember paying attention to the tarp.
>
> [ . . . ]

> . . . I didn't even see the air conditioner at the time; however, there were a lot of things on the ground. So I don't think that, even if I did see the electrical cord, that it would– that I would pay any attention to it with the amount of things strewn about the backyard.

(Docket No. 266, Ex. B, at p.82:24 – p.83:13).

The evidence indicates that the deputies may not have been paying attention to certain items, such as the air conditioner, the electrical cord, or even the tarp, because those items were not "threats" in the deputies' minds. This evidence, however, does not demonstrate that it was the tarp that blocked the deputies' view of such items. Therefore, the Court declines this fifth request to amend the findings. Both individual Defendants could have testified as to whether the shack looked different from the photographs in evidence or to anything else relevant to this crucial issue. On this point, the Motion is not to amend the judgment–it becomes a motion to reopen evidence.

Sixth, Defendants seek an additional finding that there is no evidence that the deputies knew the shed had only one door. (Mot. at 25). However, Defendants have not indicated what evidence supports such a finding. Therefore, the Court does not make this additional finding.

Seventh, Defendants seek a different finding that fifty officers were at the Albertson's debriefing. (Mot. at 25). The Findings indicate that "[a]pproximately twelve police officers . . . responded to the Albertson's" and that "[t]he responding officers then met behind the Albertson's to debrief." (Findings at 3). This finding is based on testimony at trial, indicating

that approximately ten to fourteen deputies attended the briefing at Albertson's. Defendants have not indicated what evidence supports a finding that fifty officers were present at the Albertson's debriefing. Therefore, the Court declines to make this additional finding.

### D. Award of Future Medical Expenses

Defendants also request that the award of damages for future medical expenses be stricken or reduced to present value, as required under California law. (Mot. at 25). However, as Plaintiffs argue, the damages awarded by the Court already accounted for the reduction to present value. (Opp. at 15-16). It is true that Plaintiffs' damages calculations were inflated and not specific. However, Defendants did not suggest an alternative figure–they attacked Plaintiffs' numbers. The Court, therefore, roughly balanced reasonable numbers with present value and the likelihood of increased health costs over time. The result was a number that is just and, probably, in Defendants' favor.

Defendants are correct that "[t]estimony by actuaries is frequently used to show discount rates and the present value of future benefits." *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 243, 184 Cal. Rptr. 87 (1974), overturned on other grounds, *Canavin v. Pacific Southwest Airlines*, 148 Cal. App. 3d 512, 518, 196 Cal. Rptr. 82 (1983). But Defendants have not demonstrated reduction of future damages to present value must be established by expert testimony.

Accordingly, the Motion is DENIED.

IT IS SO ORDERED.

## DISTRICT COURT JUDGMENT AFTER TRIAL (AUGUST 27, 2013)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL MENDEZ, ET L.,

*Plaintiffs,*

v.

COUNTY OF LOS ANGELES,

*Defendants..*

CV 11-04771-MWF (PJWx)

Before: Michael W. FITZGERALD.
United States District Judge

Following a trial to the Court, the Court entered its Findings of Fact and Conclusions of Law. (Docket No. 250). Consistent with the Findings of Fact and Conclusions of Law, and pursuant to Rules 54(a) and 58(b)(1)(C) of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment on the merits be entered as follows:

1. On Plaintiffs' Claim that Defendants conducted an unreasonable search (based on warrantless entry) in violation of the Fourth Amendment: Judgment in the sum of $1.00 in nominal damages is entered against Defendant Deputy Christopher Conley only,

and in favor of Plaintiffs Angel Mendez and Jennifer Lynne Garcia (now Jennifer Mendez).

2. On Plaintiffs' Claim that Defendants conducted an unreasonable search (based on failure to knock-and-announce) in violation of the Fourth Amendment: Judgment in the sum of $1.00 in nominal damages is entered, jointly and severally, against Defendants Deputies Conley and Jennifer Pederson, and in favor of Plaintiffs

3. On Plaintiffs' Claim that Defendants used excessive force (based on conduct at the moment of shooting) in violation of the Fourth Amendment: Judgment is entered in favor of Defendants Deputies Conley and Pederson.

4. On Plaintiffs' Claim that Defendants used excessive force (based on Alexander/Billington provocation) in violation of the Fourth Amendment: Judgment is entered, jointly and severally, against Defendants Deputies Conley and Pederson, and in favor of Plaintiffs, as follows:

<u>Plaintiff Angel Mendez</u>

| | |
|---|---|
| a. Past Medical Bills: | $ 721,056.00 |
| b. Future Medical Care: | |
| i. Prosthesis upkeep and replacement: | $ 407,000.00 |
| ii. Future surgeries: | $ 45,000.00 |
| iii. Psychological care (5 years): | $ 13,300.00 |
| c. Attendant Care (4 hours/day at $12.00/hour) | $ 648,240.00 |

| | |
|---|---|
| d. Loss of Earnings: | $ 241,920.00 |
| e. Non-Economic Damages: | $ 1,800,000.00 |
| Total: | $ 3,876,516.00 |

**Plaintiff Jennifer Lynn Garcia (now Jennifer Mendez)**

| | |
|---|---|
| a. Past Medical Bills: | $ 95,182.00 |
| b. Future Medical Care: | $ 37,000.00 |
| c. Non-Economic Damages: | $ 90,000.00 |
| TOTAL: | $ 222,182.00 |

5. On Plaintiffs' California tort claims: Judgment is entered in favor of Defendants Deputies Conley and Pederson.

/s/ Michael W. Fitzgerald
United States District Judge

DATED: August 27, 2013

# DISTRICT COURT FINDINGS OF FACT AND CONCLUSIONS OF LAW (AUGUST 13, 2013)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL MENDEZ, ET AL.,

*Plaintiffs*,

v.

COUNTY OF LOS ANGELES, ET AL.,

*Defendants*.

Case No. CV 11-04771-MWF (PJWx)

Before: Michael W. FITZGERALD, United States District Court Judge

This matter came on for trial before the Court sitting without a jury on February 26, 27, 28, March 1, and April 19, 2013. Following the presentation of evidence, the parties filed supplemental briefs, and after closing arguments the matter was taken under submission. The Court then ordered, and the parties filed, supplemental briefs regarding *Alexander v. City of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), and *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002).

Having carefully reviewed the record and the arguments of counsel, as presented at the hearing and in their written submissions, the Court now makes the following findings of fact and reaches the following conclusions of law pursuant to Federal Rules of Civil Procedure 52. Any finding of fact that constitutes a conclusion of law is also hereby adopted as a conclusion of law, and any conclusion of law that constitutes a finding of fact is also hereby adopted as a finding of fact.

## I. FINDINGS OF FACT

1. On October 1, 2010, at approximately 12:30 p.m.. Defendants Los Angeles County Sheriff's Department Deputies Christopher Conley and Jennifer (Pederson) Ballis shot Plaintiffs Angel Mendez and Jennifer Lynn Garcia multiple times. Plaintiffs were living together as a couple when the shooting occurred and thereafter married At trial and in these Findings of Fact and Conclusions of Law, they are therefore typically referred to as Mr. & Mrs. Mendez.

2. When shot, Mr. and Mrs. Mendez were lying on a futon in the shack in which they resided. Deputies Conley and Pederson were searching for a parolee-at-large named Ronnie O'Dell.

3. At all relevant times, Deputies Conley and Pederson were acting under color of authority of their employment with the County of Los Angeles ("COLA").

### A. The Search for Mr. O'Dell

4. Sergeant Greg Minster was a supervisor for the Lancaster, California Station Target Oriented Policing ("TOP") Team.

5. Among other things, Sergeant Minster's TOP Team tracked parolees-at-large.

6. Deputies Billy J. Cox and Veronica Ramirez were assigned to Sergeant Minster's TOP Team.

7. Prior to October 2010, Sergeant Minster's TOP Team had been searching for, and attempting to apprehend, Mr. O'Dell.

8. Mr. O'Dell was a wanted felony suspect whom the TOP Team categorized as armed and dangerous.

9. There was a warrant for Mr. O'Dell's arrest.

10. Mr. O'Dell had evaded prior attempts to apprehend him.

**B. On October 1, 2010, Mr. O'Dell Reportedly Was Spotted at an Albertson's Grocery Store in Lancaster**

11. On the morning of October 1, 2010, Officer Adam Zeko observed a man he believed to be Mr. O'Dell entering an Albertson's grocery store located at the intersection of 20th Street and K Street in Lancaster.

12. Officer Zeko reported to the Lancaster Station that he thought he had seen Mr. Odell.

13. Approximately twelve police officers, including Deputies Conley and Pederson, responded to the Albertson's.

14. Deputies Conley and Pederson were partners assigned to the Lancaster Station Community Oriented Policing ("COPS") Unit.

15. However, on October 1, 2010, Deputies Conley and Pederson were directed to supplement and assist Sergeant Minster's TOP Team.

16. Prior to October 1, 2010, Deputies Conley and Pederson did not have any information regarding Mr. O'Dell.

17. Mr. O'Dell was not found or captured at the Albertson's.

## C. The Responding Officers Then Met Behind the Albertson's

18. The responding officers then met behind the Albertson's to debrief.

19. During the debriefing session, Deputy Claudia Rissling received a tip from a confidential informant that a man he believed to be Mr. O'Dell was riding a bicycle in front of 43263 18th Street West in Lancaster, a private residence owned by Paula Hughes.

20. The responding officers then developed a plan in light of the tip regarding Mr. O'Dell's whereabouts.

21. A team of officers would proceed to the residence of Roseanne Larsen, which was located at 43520 18th Street West, Lancaster, California.

22. The officers had information that Mr. O'Dell previously had been at the Larsen residence, and the officers believed that there was a possibility that Mr. O'Dell already had left the Hughes residence.

23. At the same time, Sergeant Minster's TOP Team, as well as Deputies Conley and Pederson, would proceed to the Hughes residence.

24. Deputies Conley and Pederson were assigned to clear the rear of the Hughes property for the officers' safety (should Mr. O'Dell be hiding thereabouts) and cover the back door of the Hughes residence for containment (should Mr. O'Dell try to escape to the rear of the Hughes property).

25. During the debriefing/planning session, Deputy Rissling announced to the responding officers that a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez).

26. Deputies Conley and Pederson heard Deputy Rissling make this announcement. Deputy Pederson testified that she heard the announcement. Deputy Conley testified that he did not recall any such announcement. Either he did not recall the announcement at trial or he unreasonably failed to pay attention when the announcement was made.

## D. Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson Proceeded to the Hughes Residence

27. Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson proceeded to the Hughes residence, arriving in three different patrol cars.

### 1. The Hughes Residence and Property

28. Ms. Hughes lived in a private residence located at 43263 18th Street West in Lancaster, California.

29. The front of the Hughes residence faced east.

30. The rear of the Hughes residence faced west.

31. To the south of the Hughes residence was a gate that led to the rear of the property.

32. If one walked westward through the south gate, one would pass between the Hughes residence (to the north) and three metal storage sheds (to the south).

33. The three storage sheds were located within a concrete wall that ran the length of the southern boundary of the Hughes property.

34. Behind (*i.e.*, to the west of) the Hughes residence, a short, lightweight fence enclosed a grassy backyard area.

35. To the west of the backyard fence the ground surface was dirt, not grassy.

36. There was debris throughout the rear of the Hughes property, including abandoned automobiles located in the northwest corner of the rear property.

### 2. The Mendez Shack

37. Ms. Hughes and Mr. Mendez were friends from high school.

38. Mr. and Mrs. Mendez lived in a shack located in the rear of the property owned by Ms. Hughes.

39. The shack was located in the dirt-surface area to the rear of the Hughes property approximately thirty feet west of the Hughes residence—*i.e.*, west of the backyard fence, and southeast of the abandoned automobiles.

40. Mr. Mendez had constructed the shack out of wood and plywood.

41. Mr. and Mrs. Mendez had been living in the shack for approximately ten months.

42. Mr. and Mrs. Mendez were not yet married.

43. Mrs. Mendez was five-months pregnant.

44. The shack was approximately seven-feet wide, seven-feet long, and seven-feet tall.

45. The shack had a single doorway entrance that faced east toward the Hughes residence.

46. The doorway was approximately six-feet tall and three-feet wide.

47. In the doorway, from the top of the door-frame, hung a blue blanket.

48. Outside of the blue blanket was a hinged wooden door, which opened to the outside of the shack.

49. Outside of the wooden door was a hinged screen door, which opened to the outside of the shack.

50. The shack did not have any windows or other points of entry or exit.

51. Located a few feet to northeast of the shack was a white gym storage locker that contained clothes, coats and other possessions.

52. There were also clothes and other possessions located a few feet to the east of the shack.

53. There was a tree to the north of the shack and the white gym storage locker.

54. There was a blue tarp covering the roof of the shack.

55. There was an electrical cord running into the shack.

56. There was an electrical cord running into the shack.

57. There was an air conditioner mounted on the north side of the shack.

58. Inside the shack was a full-size futon.

59. The futon ran lengthwise against the back (western) interior wall of the shack.

60. The other (eastern) side of the futon was approximately three feet from the doorway to the shack.

61. Mr. Mendez kept a BB gun rifle in the shack in order to shoot rats, mice and other pests.

62. The BB gun rifle had a black barrel, brown stock and orange safety switch.

63. The butt end of the BB gun rifle had been broken off from the barrel after someone had stepped on it.

64. The Court examined the BB gun rifle at trial, but the BB gun rifle was not admitted as an exhibit. The BB gun rifle closely resembled a small caliber rifle.

65. Ms. Hughes sometimes would open the door to the shack unannounced to "prank" or play a joke on Mr. and Mrs. Mendez.

**E. Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson Approached the Hughes Residence**

66. When Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson arrived at the Hughes residence, they observed a bicycle on the front lawn.

67. The officers did not have a search warrant to search the Hughes residence.

68. Sergeant Minster directed Deputies Conley and Pederson to proceed to the back of the Hughes residence through the south gate.

69. Sergeant Minster and Deputies Cox and Ramirez went to the front door of the Hughes residence.

70. Sergeant Minster banged on the security screen outside the front door.

71. Sergeant Minster testified that if both the front door and the security screen had been open, he would have gone to the front door to see if someone was going to come to the front door and then contacted that person.

72. From within the Hughes residence, a woman (Ms. Hughes) asked what the officers wanted.

73. Sergeant Minster asked Ms. Hughes to open the door.

74. Ms. Hughes asked if the officers had a warrant.

75. Sergeant Minster said that they did not, but that they were searching for Mr. O'Dell and had a warrant to arrest him.

76. Sergeant Minster then heard running within the Hughes residence, toward the back of the residence.

77. Sergeant Minster believed Mr. O'Dell was within the Hughes residence.

78. Sergeant Minster directed Deputies Cox and Ramirez to retrieve the pick and ram because Ms. Hughes no longer was communicating from within the residence.

79. Deputy Cox set the pick into the left side of the doorframe.

80. At that point, Ms. Hughes again communicated from within the residence.

81. Sergeant Minster again stated that the officers were looking for Mr. O'Dell.

82. Ms. Hughes responded that Mr. O'Dell was not at her residence.

83. Sergeant Minster again requested that the officers be allowed to search her residence.

84. Ms. Hughes opened the front door and the security screen.

85. Ms. Hughes was pushed to the ground and handcuffed.

86. Deputy Ramirez placed Ms. Hughes in the backseat of one of the patrol cars.

87. Sergeant Minster and Deputy Cox searched for Mr. O'Dell in the Hughes residence.

88. The officers did not find Mr. O'Dell, or anyone else, in the Hughes residence.

## F. Deputies Conley and Pederson Cleared the Three Storage Sheds

89. Meanwhile, Deputies Conley and Pederson headed west through the south gate of the Hughes residence—*i.e.*, the gate to the south of the Hughes residence that led to the rear of the property.

90. Deputies Conley and Pederson checked each of three storage sheds between the Hughes residence and the southern wall bordering the Hughes property.

91. Deputies Conley and Pederson had their guns drawn because they were searching for Mr. O'Dell, whom they believed to be armed and dangerous.

92. Deputies Conley and Pederson did not find Mr. O'Dell, or anyone else, in the three storage sheds between the Hughes residence and the southern wall bordering the Hughes property.

93. At the time Deputies Conley and Pederson entered the backyard of the Hughes residence, the back door of the Hughes residence was open; Sergeant Minster and Deputy Cox were inside the Hughes residence.

94. Deputy Pederson informed Sergeant Minster that she and Deputy Conley would clear the remainder of the property to the rear of the Hughes residence.

95. Sergeant Minster assented.

## G. Deputies Conley and Pederson Approached the Mendez Shack

### 1. The Deputies' Point of View

96. Deputies Conley and Pederson proceeded west into the dirt-surface area to the rear (west) of the Hughes property.

97. Deputies Conley and Pederson did not have a search warrant to search the shack.

98. Deputies Conley and Pederson did not "knock and announce" their presence at the shack.

99. Deputies Conley and Pederson recognized that the shack had a door.

100. Deputies Conley and Pederson were trained not to approach or stand in front of a door in case there was a threat behind the door.

101. Consequently, Deputies Conley and Pederson approached the shack from the south—*i.e.*, to the left of the door (from the Deputies' point of view).

102. As they approached the shack, Deputy Conley was in front of Deputy Pederson.

103. The wooden door to the shack was closed; the screen door to the shack was open.

104. Prior to opening the door to the shack, Deputy Conley did not feel threatened.

105. Deputy Conley and Deputy Pederson both testified that they did not perceive the shack to be a habitable structure. The Court finds that they acted as they did because they believed the shack to be simply another storage shed, similar to the three on the south side of the property that they had already

searched. Therefore, it was their perception that the only person who might have been in the shack would have been Mr. O'Dell, trying to remain hidden.

106. Having listened to the testimony and examined numerous photographs of the Hughes property, the Court finds that this perception of Deputies Conley and Pederson was not reasonable. They had been told that the shack was inhabited. The shack was a different structure from the sheds. The shack was in a different location. The following were all indicia of habitation: The air conditioner, electric cord, water hose, and clothes locker.

107. In photographs of the scene admitted into evidence, the door to the clothes locker was open. Neither Mr. Mendez, Mrs. Mendez, nor Deputy Pederson testified to whether the door of the clothes locker was open at the time of the incident. Deputy Conley testified that he did not remember whether the door was open.

108. Deputy Conley opened the wooden door to the shack.

109. Deputy Conley pulled back the blue blanket that was hanging from the top of the doorframe.

110. As Deputy Conley pulled back the blue blanket, Deputies Conley and Pedersen saw the silhouette of an adult male (Mr. Mendez) holding—what they believed to be—a rifle.

### 2. Mr. and Mrs. Mendez's Point of View

111. Mr. and Mrs. Mendez were napping on the futon inside the shack.

112. Mr. and Mrs. Mendez were lying with their bodies in a north-south direction and with their heads to the north side of the futon/shack.

113. Mr. and Mrs. Mendez were lying side-by-side on the futon with Mrs. Mendez to Mr. Mendez's right—west of him.

114. Mrs. Mendez was closer to the back (western) interior wall of the shack.

115. Mr. Mendez was closer to the door of the shack (on the east side of the shack).

116. Mr. Mendez had the BB gun rifle next to him on the futon—to his left, east of him.

117. The barrel of the BB gun rifle pointed south.

118. When Mr. Mendez perceived the wooden door being opened, he thought it was Ms. Hughes playing a joke.

119. As the wooden door opened, Mr. Mendez picked up the BB gun rifle to put it on the floor of the shack so that he could put his feet on the floor of the shack and sit up.

120. Mrs. Mendez also perceived the door opening but was lying on her right side, facing the back (western) interior wall of the shack.

### 3. Whether the BB Gun Rifle Was Pointed at Deputies Conley and Pederson

121. The witness testimony conflicts as to how and where Mr. Mendez was holding the BB gun rifle, whether and in what direction he was moving the BB gun rifle, and whether Mr. Mendez pointed the BB gun

rifle (intentionally or otherwise) at Deputies Conley and Pederson.

122. In court, Mr. Mendez attempted a reenactment of his getting out of bed with the BB gun rifle. Based on that demonstration and the testimony of the all the witnesses, the Court finds that the barrel of the BB gun rifle would necessarily have pointed somewhat south towards Deputy Conley, even if the intent of Mr. Mendez was simply to use the BB gun rifle to help him sit-up.

123. Deputies Conley and Pederson perceived Mr. Mendez holding the BB gun rifle.

124. Deputies Conley and Pederson reasonably believed that the BB gun rifle was a firearm rifle.

125. Deputies Conley and Pederson reasonably believed that the man (Mr. Mendez) holding the firearm rifle (a BB gun rifle) threatened their lives.

## H. Deputies Conley and Pederson Fired Their Guns

126. Almost immediately, Deputy Conley yelled, "Gun!"

127. And, almost immediately, both Deputies Conley and Pederson fired their guns in the direction of Mr. Mendez, fearing that they would be shot and killed.

128. At the time they fired their guns, neither Deputy Conley nor Deputy Pederson saw Mrs. Mendez.

129. Mr. Mendez screamed, "Stop shooting! Stop shooting!"

130. Deputy Conley fired ten times while moving backward (east) away from the shack.

131. Deputy Pederson fired five times while moving backward (east) and to her left (south).

132. According to their training, Deputies Conley and Pederson were "shooting and moving" until there was no threat.

133. Mr. O'Dell was not found in the shack or captured elsewhere that day.

134. No one was inside the shack other than Mr. and Mrs. Mendez.

## I. Mr. and Mrs. Mendez Were Injured

135. The gunshots injured both Mr. and Mrs. Mendez.

136. Mr. and Mrs. Mendez were shot multiple times and suffered severe injuries.

137. Mr. Mendez was shot in the right forearm, right shin, right hip/thigh, right lower back, and left foot.

138. Mr. Mendez's right leg was amputated below the knee.

139. Mrs. Mendez was shot in the right upper back/clavicle, and a bullet grazed her left hand.

140. The Sheriff's Department documented nine bullet holes in and around the shack and collected four bullets.

141. The Sheriff's Department did not determine which bullets were fired from Deputy Conley's gun and which were fired from Deputy Pederson's gun.

142. The Sheriff's Department did not determine how many or which bullets struck Mr. and/or Mrs. Mendez or whether Deputy Conley or Deputy Pederson fired each or any of the bullets that struck Mr. and/or Mrs. Mendez.

## J. Damages

143. Mr. and Mrs. Mendez's medical bills were admitted into evidence.

144. Jalil Rashti, M.D., an orthopedic surgeon, testified to his treatment of Mr. and Mrs. Mendez.

145. Dr. Rashti also testified to Mr. and Mrs. Mendez's future medical care and provided an estimate as to the cost of future attendant care for Mr. Mendez.

146. There was no testimony regarding Mr. or Mrs. Mendez's life expectancy.

147. Mr. Mendez testified that, prior to the incident, he had earned from $1,400 to $2,400 per month as a construction "freelancer" or "gopher," landscaping, and working for a sanitation company.

148. Mr. Mendez also testified that he had not worked since 2008.

149. Mr. and Mrs. Mendez each testified to their emotional and psychological suffering.

150. Lawrence J. Coates, Ph.D., a licensed psychologist, testified to his treatment of Mr. and Mrs. Mendez.

151. Plaintiffs filed a Statement of Damages. (Docket No. 230). Defendants filed Objections to Plaintiffs' Statement of Damages. (Docket No. 234).

Certain of the objections were well taken; moreover, certain requested amounts were logically unsupported or simply grandiose. Nonetheless, some amount of damages for certain categories are undoubtedly deserved. The Court examined the underlying exhibits and used common sense in deciding the various sums for damages.

152. The position of Plaintiffs is that Mr. Mendez's life expectancy is 81 years but did nothing to establish that number in the record. To the limited extent it matters, the Court believes that 70 years would be more appropriate, given the pre-shooting circumstances of Mr. Mendez's life.

153. The Court did not discount the medical damages to the present value, in recognition of inflation in general and the undoubted rise in the costs of medical care in particular. The Court discounted the requested amount of future earnings, both because of the sporadic nature of Mr. Mendez's employment as a manual laborer and very roughly to reflect present value.

## II. CONCLUSIONS OF LAW

Pursuant to 42 U.S.C. § 1983, Mr. and Mrs. Mendez allege various claims under the Fourth Amendment (as applied to Defendants through the Fourteenth Amendment) of the United States Constitution. Mr. and Mrs. Mendez also allege several related California tort claims. Defendants argue that Mr. and Mrs. Mendez's Fourth Amendment claims fail because Deputies Conley and Pederson are shielded from liability by qualified immunity, and that Mr. and Mrs. Mendez's tort claims fail because the Deputies' conduct was reasonable under the circumstances.

## A. Qualified Immunity

When the defense of qualified immunity is raised, there are two threshold questions a court must answer. First, was there a violation of a constitutional right? Second, was that right clearly established? *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Under the second *Saucier* prong, the question is whether the constitutional right at issue was clearly established "'in light of the specific context of the case.'" *Scott*, 550 U.S. at 377 (quoting *Saucier*, 533 U.S. at 201). "Under *Saucier*'s qualified immunity inquiry, the second question requires the court to ask whether a reasonable officer could have believed that his conduct was lawful." *Dixon v. Wallowa County*, 336 F.3d 1013, 1019 (9th Cir. 2003).

"The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citing *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed.2d 1068 (2004)).

Furthermore, "[t]o be clearly established, a right must be sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right." *Reichle v. Howards*,— U.S.—, 132 S. Ct. 2088, 2093, 182 L. Ed. 2d 985 (2012) (citation and internal quotation marks omitted). "In other words, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (citation and internal quotation marks omitted). "This 'clearly established' standard protects the balance between vindication of

constitutional rights and government officials' effective performance of their duties by ensuring that officials can reasonably . . . anticipate when their conduct may give rise to liability for damages." *Id.* (citation and internal quotation marks omitted).

However, the "question is not whether an earlier case mirrors the specific facts here. Rather, the relevant question is whether 'the state of the law at the time gives officials fair warning that their conduct is unconstitutional.'" *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013) (citing *Bull v. City of San Francisco*, 595 F.3d 964, 1003 (9th Cir. 2010) (en banc) ("[T]he specific facts of previous cases need not be materially or fundamentally similar to the situation in question.")); *White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000) ("Closely analogous pre-existing case law is not required to show that a right was clearly established.") (citations omitted); *see also Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004) ("If the right is clearly established by decisional authority of the Supreme Court or this Circuit, our inquiry should come to an end. On the other hand, when there are relatively few cases on point, and none of them are binding, we may inquire whether the Ninth Circuit or Supreme Court, at the time the out-of-circuit opinions were rendered, would have reached the same results." (citation and internal quotation marks omitted)).

## B. Fourth Amendment: Unreasonable Search

Mr. and Mrs. Mendez first argue that Deputies Conley and Pederson violated their Fourth Amendment right to be free from an unreasonable search.

Under the Fourth Amendment, "we inquire, serially, whether a search has taken place; whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement; whether the search was based on probable cause or validly based on lesser suspicion because it was minimally intrusive; and, finally, whether the search was conducted in a reasonable manner." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 641-42, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (citations omitted).

The Court addresses each of these elements in turn below.

**1. Expectation of Privacy**

The United States Supreme Court "uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740-41, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979) (citing cases).

"In accordance with the common law, our Fourth Amendment precedents recogniz[e] . . . that rights such as those conferred by the Fourth Amendment are personal in nature, and cannot bestow vicarious protection on those who do not have a reasonable expectation of privacy in the place to be searched." *Minnesota v. Carter*, 525 U.S. 83, 101, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) (citation and internal quotation marks omitted). "The claimant must establish that he personally had a legitimate expectation of privacy in the premises he was using and therefore could claim the

protection of the Fourth Amendment with respect to a governmental invasion of those premises." *McDonald v. City of Tacoma*, No. 11-cv-5774-RBL, 2013 WL 1345349, at *3 (W.D. Wash. Apr. 2, 2013) (citing *Rakas v. Illinois*, 439 U.S. 128, 134, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)).

"To establish a constitutionally protected reasonable expectation of privacy, [the plaintiff] must demonstrate both a subjective and objective expectation of privacy." *United States v. Rivera*, 10 F. App'x 617, 620 (9th Cir. 2001) (citing *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986)). Mr. and Mrs. Mendez "have the burden of establishing that, under the totality of the circumstances, the search or the seizure violated their legitimate expectation of privacy." *United States v. Silva*, 247 F.3d 1051, 1055 (9th Cir. 2001) (citation omitted).

In this case, the question is whether Mr. and Mrs. Mendez had a legitimate expectation of privacy in the shack.

**a. The Mendez Shack Was Within the Curtilage of the Hughes Residence**

"The presumptive protection accorded people at home extends to outdoor areas traditionally known as 'curtilage'—areas that, like the inside of a house, 'harbor[] the intimate activity associated with the sanctity of a [person's] home and the privacies of life.'" *United States v. Struckman*, 603 F.3d 731, 738 (9th Cir. 2010) (citing *United States v. Dunn*, 480 U.S. 294, 300, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987)).

"[C]ourts have [therefore] extended Fourth Amendment protection to the curtilage to a home,

defining the extent of the curtilage with reference to four factors":

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."

*Id.* at 739 (citation and internal quotation marks omitted) (citing *Dunn*, 480 U.S. at 301). "Every curtilage determination is distinctive and stands or falls on its own unique set of facts." *United States v. Depew*, 8 F.3d 1424, 1426 (9th Cir. 1993).

In this case, the shack was approximately thirty feet from the Hughes residence. While the shack was not within the fence that enclosed the grassy backyard area, it was located in the dirt-surface area that was part of the rear of the Hughes property. Mr. Mendez himself had constructed the shack. Mr. and Mrs. Mendez had lived in the shack for ten months before the date of the incident. Finally, there is no evidence in the record that people passing by the Hughes residence on 18th Street West could observe the shack without passing through the south gate and entering the rear of the Hughes property.

Therefore, under the *Dunn* factors, the shack was within the curtilage of the Hughes residence.

### b. Even if the Shack Was Without the Curtilage of the Hughes Residence, It Was a Protected Structure

Moreover, the "Fourth Amendment protects structures other than dwellings. '[O]ne may have a legally sufficient interest in a place other than her own house so as to extend Fourth Amendment protection from unreasonable searches and seizures in that place. [A] structure need not be within the curtilage in order to have Fourth Amendment protection.'" *United States v. Santa Maria*, 15 F.3d 879, 882-83 (9th Cir. 1994) (citing *United States v. Broadhurst*, 805 F.2d 849, 851, 854 n.7 (9th Cir. 1986)) (citing *United States v. Hoffman*, 677 F. Supp. 589, 596 (E.D. Wis. 1988) ("[A] person can have a protected expectation of privacy in buildings (*i.e.*, barns, garages, boathouses, stables, etc.) that are located far outside the area of the curtilage of the home.")) (citing cases); *see also United States v. Burke*, No. CR. S-05-0365 FCD, 2009 WL 173829, at *12 (E.D. Cal. Jan. 23, 2009) ("[A]s with a residence, the court looks to the totality of the circumstances in determining whether a defendant has a legitimate expectation of privacy in a storage area." (citing *United States v. Silva*, 247 F.3d 1051, 1056 (9th Cir. 2001)).

For the same reasons discussed above, even if the shack was without the curtilage of the Hughes residence, the shack was a protected structure.

### c. The Shack Was a Separate Dwelling Unit

Regardless of whether the shack was within or without the curtilage of the Hughes residence, "there is no Fourth Amendment rule that provides for pro-

tection only for traditionally constructed houses." *United States v. Barajas-Avalos*, 377 F.3d 1040, 1046 (9th Cir. 2004) (internal quotation marks omitted) (discussing Fourth Amendment rights in twelve-foot travel trailer). "It is quite true that a person has a right to privacy in his dwelling house, or temporary sleeping quarters, whether in a hotel room, a trailer, or in a tent in a public area . . . ." *Id.* at 1055.

"Because the home is accorded the full range of Fourth Amendment protections against unlawful searches and seizures, an unconsented police entry into a residential unit (whether a house, apartment, or hotel room) constitutes a search for which a warrant must be obtained." *United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001) (citations and internal quotation marks omitted).

In *Cannon*, there were two structures within the fence that surrounded the defendant's residence at 1250 Hemlock Street in Chico, California. *Id.* at 877. The government agent "reasonably assumed" that the second structure was a garage. *Id.* at 878 (emphasis added) ("In the evidentiary hearing, the district court found that before executing the warrant on 1250 Hemlock, the DEA agent reasonably believed the rear building to be a garage.").

However, the defendant (Mr. Cannon) had converted the rear building from a garage into a self-contained residential unit approximately twenty years earlier. *Id.* Mr. Cook rented the rear building's residential unit from Mr. Cannon. The rear building itself consisted of three areas with separate entrances: Mr. Cook's dwelling unit and two storage rooms. *Id.*

Based on the facts of that case, the Ninth Circuit concluded that the "rental unit was clearly a separate dwelling for which a separate warrant was required" and that it could not "be viewed as an extension of the main house." *Id.* at 879 (citation omitted) ("Similarly, a search of a guest room in a single family home which is rented or used by a third party, and, to the extent that the third party acquires a reasonable expectation of privacy, requires a warrant." (citing *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)).

Significantly, the Ninth Circuit concluded that Mr. Cook's residential unit was a separate dwelling even though the "entire rear building at 1250 Hemlock qualifie[d] as curtilage of Cannon's residence." *Id.* at 881 ("Cook possessed a reasonable expectation of privacy in the rear building rooms he rented . . . ."). Indeed, the Ninth Circuit concluded further that, on the facts of that case, the "storage rooms were an extension of defendant Cannon's residence." *Id.* garages in Chico had often been converted without permits into student residences. *Id.* at 878. Had the rear structure still been a garage, then the warrant for the main house would have covered that garage as well. *Id.* at 880.

*United States v. Greathouse*, 297 F. Supp. 2d 1264 (D. Or. 2003), is illustrative. In *Greathouse*, the district court began its analysis by noting the Ninth Circuit's observation in *Cannon* that the "rental unit contained its own kitchen appliances and its own bathroom." *Id.* at 1274. The district court continued:

> The government argues that because the defendant's bedroom was not a self-contained unit with its own appliance and bathrooms,

and because there was no separate lock, number or entrance, the officers necessarily acted reasonably in concluding that the entirety of the residence was occupied in common.

First, I note that the focus under *Maryland v. Garrison* must be upon the reasonableness of the officers' actions under the circumstances. When they entered the residence, they did not know that the defendant in fact kept to himself in his bedroom. However, I disagree with the government's assertion that the physical layout is dispositive. Doorbells, deadbolts and separate appliances are certainly indicia of separate units, but nothing in the case law indicates that these are prerequisites. Nor is there any support for the assumption that unrelated people who share a house, but maintain separate bedrooms have no independent right to privacy in bedrooms maintained for their exclusive use. In this case, there is no dispute that the kitchen, bathroom and living room areas were occupied in common. There is also no dispute that the defendant's bedroom door was closed when the officers and agents entered and that he had a "Do Not Enter" sign posted on his door. There was no lock on the door, no number and no separate door bell.

However, the agents and officers were immediately advised by [another resident] that the defendant was a renter and that he

> lived in the back bedroom on the first floor. It was also apparent to the officers that there was no familial relation between any of the residents; they were simply a group of people sharing a house. I find that, upon learning this information from [the resident], when coupled with the sign on the defendant's door and the apparent absence of any familial or other connection between the residents, the agents at that point should have known there were separate residences within the house and should have stopped and obtained a second warrant for the defendant's bedroom. There is no question that they could have secured the area and obtained a telephonic warrant without fear of destruction of evidence. Their failure to do [so] is an alternative basis for suppression of the evidence.

*Id.* at 1274-75 (emphasis added).

In *United States v. Flyer*, No. CR051049TUC-FRZ(GEE), 2006 WL 2590460 (D. Ariz. May 26, 2006), the district court distinguished *Cannon* on the facts, concluding that *Cannon* did not "support[] the necessity of a separate warrant to search the defendant's room in this case." *Id.* at *4. In *Flyer*, the district court ruled that "there was no need for a separate search warrant before searching the defendant's room" based on the following facts:

> The defendant's room was within the single family residence described in the affidavit and search warrant There was no separate entrance to his room from the outside of the residence. While he apparently was free to

> eat meals in his room, he had no refrigerator or cooking stove in his room and no separate bathroom. Although his mother described him as a "boarder", she admitted he paid no rent and was free to eat the food she purchased for the household. Although the defendant expected other household members would "respect" his privacy and not enter his room without his consent, he did not affix another lock to his room to insure his privacy. There is no evidence the defendant objected to the search of his room during the execution of the warrant.

*Id.*

Several other cases that predate *Cannon* are instructive. In *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), the police officers obtained and executed a warrant to search the person of Lawrence McWebb and the "premises known as 2036 Park Avenue third floor apartment." *Id.* at 80. While the officers "reasonably believed" that there was only one apartment on the premises, the third floor was divided into two apartments, one occupied by Mr. McWebb and the other by the defendant. *Id.* But before the officers executing the warrant realized that they were in a separate apartment occupied by the defendant, they discovered the contraband that provided the basis for his later conviction. *Id.*

According to the United States Supreme Court,

> If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had

> been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant.

*Id.* at 86-87. Therefore, the question was whether the failure of the officers to recognize the overbreadth of the warrant was reasonable. *Id.*

In *Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000), the officers secured a warrant to search a "poor house"—"a residence with a large number of subjects residing in a residence designed for one family." *Id.* at 1035. The plaintiffs, who owned the residence, argued that the search violated their constitutional rights because, "even after realizing that there were multiple units within the [plaintiffs'] house, the police searched the entire premises, including the individual residential units." *Id.* at 1038. The Ninth Circuit rejected the defendant officers argument that the "execution of the search was valid because probable cause existed to search the entire premises, not just [the suspect]'s room and the common areas." *Id.* The Ninth Circuit determined that the officers should have realized that the house in fact consisted of a multi-unit residential dwelling, and therefore were obliged to limit their search. *Id.*

Here, *Cannon* is determinative for these reasons:

First, Deputies Conley and Pederson differentiated (or should have differentiated) the shack from the three storage sheds next to (to the south of) the Hughes residence. The shack was located in a different area of the rear of the Hughes property at a distance from the Hughes residence and the storage sheds. The storage sheds were metal. The shack was wood.

Second, Deputies Conley and Pederson observed (or should have observed) a number of objective indicia demonstrating that the shack was a separate residential unit: the shack had a doorway; the shack had a hinged wooden door and a hinged screen door; a white gym storage locker was located nearby the shack; clothes and other possessions also were located nearby the shack; a blue tarp covered the roof of the shack; an electrical cord ran into the shack; a water hose ran into the shack; and an air conditioner was mounted on the side of the shack.

Third, and importantly, Deputies Conley and Pederson had information that a man and woman lived in the rear of the Hughes property. In light of this information, and unlike *Cannon* and similar cases, Deputies Conley and Pederson could not have "reasonably assumed" that the shack was another storage shed.

Therefore, the shack was a separate dwelling unit under *Cannon*.

#### d. Mr. and Mrs. Mendez Had a Reasonable Expectation of Privacy in the Shack

The "Fourth Amendment protects people, not places." *United States v. Jones*, 132 S. Ct. 945, 950, 181 L. Ed. 2d 911 (2012) (citing *Katz v. United States*,

389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). Consequently, the question is not whether the shack was a protected structure, but whether Mr. and Mrs. Mendez had a reasonable expectation of privacy in the shack.

Mr. Mendez himself had constructed the shack. Before the date of the incident, Mr. and Mrs. Mendez had lived in the shack for ten months. Their possessions were in or around the shack. It was their home. The fact that Ms. Hughes sometimes would open the door to the shack unannounced to "prank" or play a joke on them is insufficient to show that Mr. and Mrs. Mendez did not have a subjective expectation of privacy in the shack or that this expectation was unreasonable.

Accordingly, Mr. and Mrs. Mendez had a subjective expectation of privacy in the shack. And this expectation was reasonable under *Cannon*.

### e. Overnight Guest Status

In addition, the "Supreme Court has carefully examined the surrounding circumstances to determine whether a guest's status is sufficiently like home-occupancy so as to give rise to a reasonable expectation of privacy. In so doing, the Court has distinguished between 'overnight guests' and those who were simply on the premises with the owner's permission":

> In the case of the overnight guest, the Supreme Court reasoned that an overnight guest seeks shelter in the host's home "precisely because it provide[d] him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows." Thus, the

> overnight guest's expectation of privacy is recognized and a shared societal norm. The Court contrasted overnight guests with persons simply present on the premises, even with the owner's permission, and concluded that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not."

*McDonald*, 2013 WL 1345349, at *3 (citing *Minnesota v. Carter*, 525 U.S. 83, 87-90, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998)).

Based on the same set of facts, Mr. and Mrs. Mendez—at the very least—were long-term, overnight guests staying within a protected structure within or without the curtilage of the Hughes residence. For the reasons discussed above, Mr. and Mrs. Mendez had a subjective and objective expectation of privacy in the shack.

### 2. Search

"Under the traditional approach, the term 'search' is said to imply" the following:

> some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or

> intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search."

1 Wayne R. LaFave, *Search and Seizure*: *A Treatise on the Fourth Amendment* § 2.1(a) (5th ed. 2012) ("The Supreme Court, quite understandably, has never managed to set out a comprehensive definition of the word 'searches' as it is used in the Fourth Amendment.").

Here, Deputy Conley searched the shack when he opened the wooden door and pulled back the blue blanket that hung from the top of the doorframe. Deputy Pederson, however, did not search the shack.

### 3. Probable Cause/Warrant Requirement

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (citations omitted).

It is undisputed that Deputy Conley did not have a warrant to search the shack, nor do any of the exceptions to the warrant requirement apply.

#### a. Consent

The "consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *United States v. Matlock*, 415

U.S. 164, 170, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). "But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. 218, 228.

The Court assumes for purposes of this analysis that Ms. Hughes could have consented to a search of the shack. Ms. Hughes opened her front door and the security screen only after Sergeant Minster and Deputies Cox and Ramirez had brought the pick and ram out from the patrol car and set the pick against her doorframe. To the extent that this can be construed as "consent," it was coerced and consequently invalid. Nor, for that matter, did Ms. Hughes give any indication of consent to Deputy Conley's search of the shack.

Furthermore, Mr. and Mrs. Mendez did not consent to the search of the shack.

**b. Parolee Search**

"[B]efore conducting a warrantless search [of a residence] pursuant to a parolee's parole condition, law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched." *United States v. Franklin*, 603 F.3d 652, 656 (9th Cir. 2010) (citation and internal quotation marks omitted).

There is no evidence in the record that Mr. O'Dell was a resident of the Hughes residence—on the date

of the incident or otherwise. This warrant exception does not apply.

**c. Exigency/Emergency Exceptions**

"In particular, [t]here are two general exceptions to the warrant requirement for home searches: exigency and emergency." *United States v. Struckman*, 603 F.3d 731, 738 (9th Cir. 2010) (citation and internal quotation marks omitted). The Ninth Circuit has "described these exceptions as follows":

> The "emergency" exception stems from the police officers' "community caretaking function" and allows them "to respond to emergency situations" that threaten life or limb; this exception does "not [derive from] police officers' function as criminal investigators." By contrast, the "exigency" exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is "necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."

*Id.* (citations omitted). "To succeed in invoking these exceptions, the government must . . . show that a warrant could not have been obtained in time." *Id.* (citation and internal quotation marks omitted) (emphasis added). The "police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh*

*v. Wisconsin*, 466 U.S. 740, 749-50, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

Significantly, [t]here's no disputing that the [Supreme] Court considers the curtilage to stand on the same footing as the home itself for purposes of the Fourth Amendment." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1122 (9th Cir. 2010). "When the warrantless search is to home or curtilage, we recognize two exceptions to the warrant requirement: exigency and emergency." *Sims v. Stanton*, 706 F.3d 954, 960 (9th Cir. 2013) ("[C]urtilage is protected to the same degree as the home . . . ."); *United States v. Perea-Rey*, 680 F.3d 1179, 1185 (9th Cir. 2012) ("Warrantless trespasses by the government into the home or its curtilage are Fourth Amendment searches." (citation omitted)).

### d. Exigent Circumstances

"[W]arrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *United States v. Snipe*, 515 F.3d 947, 950 (9th Cir. 2008) (citation and internal quotation marks omitted). "It is clearly established Federal law that the warrantless search of a dwelling must be supported by probable cause and the existence of exigent circumstances." *Struckman*, 603 F.3d at 739 (citation and internal quotation marks omitted).

"[W]hen the government relies on the exigent circumstances exception [to the Fourth Amendment warrant requirement], it . . . must satisfy two requirements: first, the government must prove that the

officer had probable cause to search the house; and second, the government must prove that exigent circumstances justified the warrantless intrusion." *Id.* (citations omitted).

### (i). Probable Cause

"Generally, if a structure is divided into more than one occupancy unit, probable cause must exist for each unit to be searched." *Mena*, 226 F.3d at 1038 (citation omitted). "This rule, however, is not absolute. For example, we have held that a warrant is valid when it authorizes the search of a street address with several dwellings if the defendants are in control of the whole premises, if the dwellings are occupied in common, or if the entire property is suspect." *Id.* (citations omitted) (concluding that the officers had probable cause to search, at most, the suspect's room and one other room, in addition to the common areas, but not any of the other rooms); *see also United States v. Whitten*, 706 F.2d 1000, 1008 (9th Cir. 1983) ("[A] warrant may authorize a search of an entire street address while reciting probable cause as to only a portion of the premises if they are occupied in common rather than individually, if a multiunit building is used as a single entity, if the defendant was in control of the whole premises, or if the entire premises are suspect."); *United States v. Whitney*, 633 F.2d 902, 907-08 (9th Cir. 1980) (discussing exceptions to rule that "when the structure under suspicion is divided into more than one occupancy unit, probable cause must exist for each unit to be searched."); *United States v. Gilman*, 684 F.2d 616, 618 (9th Cir. 1982) ("Even if a warrant authorizes the search of an entire premises containing multiple units while reciting probable cause as to a portion of the premises only, it

does not follow either that the warrant is void or that the entire search is unlawful.").

Here, Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson were proceeding based on the tip from a confidential informant—relayed by Deputy Rissling at the debriefing/planning session behind the Albertson's—that a man he believed to be Mr. O'Dell was riding a bicycle in front of the Hughes residence. When the officers arrived at the Hughes residence, they observed a bicycle on the front lawn. While Deputies Conley and Pederson were to cover the back door of the Hughes residence should Mr. O'Dell attempt to escape to the rear of the property, they also were ordered to clear the rear of the property should Mr. O'Dell be hiding somewhere thereabouts. Nothing about the confidential informant's tip was specific to the Hughes residence as opposed to the rear of the property, including the shack.

Therefore, the officers had probable cause to search for Mr. O'Dell inside the Hughes residence, and Deputy Conley had probable cause to search for Mr. O'Dell inside the shack.

**(ii). Exigency**

"The exigent circumstances exception is premised on few in number and carefully delineated circumstances, in which the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at 743 (citations and internal quotation marks omitted). "We have previously defined those situations as (1) the need to prevent physical harm to the officers or other

persons, (2) the need to prevent the imminent destruction of relevant evidence, (3) the hot pursuit of a fleeing suspect; and (4) the need to prevent the escape of a suspect." *Id.* (citations omitted). "Because the Fourth Amendment ultimately turns on the reasonableness of the officer's actions in light of the totality of the circumstances, however, there is no immutable list of exigent circumstances; they may include some other consequence improperly frustrating legitimate law enforcement efforts." *Id.* (citations and internal quotation marks omitted). "The government bears the burden of showing specific and articulable facts to justify the finding of exigent circumstances." *Id.* (citation and internal quotation marks omitted).

In this case, an important predicate question is whether the Court should make the determination of exigent circumstances with respect to the Hughes residence and its curtilage or separately as to the shack itself.

*Cannon* holds that a search of a separate dwelling unit, even if within the curtilage of the main residence, requires a separate warrant. In this case, the shack is akin to the Cook residential unit in *Cannon*. Consequently, if Deputy Conley had had a warrant to search the Hughes residence (and its curtilage), he nevertheless would have needed a separate warrant to have searched the shack itself. *See Cannon*, 264 F.3d 875, 877-79 (separate dwelling required separate warrant).

Therefore, Deputy Conley must invoke a warrant exception as to the shack itself, rather than as to the Hughes residence (and its curtilage). As the Supreme Court has made clear, the "most basic constitutional rule in this area is that searches conducted outside

the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (citation and internal quotation marks omitted). "The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative. [T]he burden is on those seeking the exemption to show the need for it." *Id.* (citation and internal quotation marks omitted).

The determinative question, then, is whether there was exigency to search the shack itself. Specifically, the question is whether under the totality of the circumstances it was reasonable—on account of exigency—for Deputy Conley to search the shack itself without a warrant.

The question is not whether there was any exigency to search the Hughes residence (and its curtilage). Consequently, the Court reaches no conclusion as to whether Sergeant Minster and Deputies Cox and Ramirez's warrantless search of the Hughes residence was reasonable pursuant to the exigent circumstances exception to the warrant requirement.

With respect to the shack itself, Defendants essentially argue that there was exigency for the warrantless search to prevent Mr. O'Dell's possible escape and for the safety of the five officers on the scene. The shack had a single doorway. If Mr. O'Dell had been within the shack, he was trapped. If Mr. O'Dell had been elsewhere on the Hughes property,

then there was no exigent reason to search the shack. Deputy Conley could have obtained a warrant "in time."

Likewise with respect to officer safety, if Mr. O'Dell was within the shack, he was trapped. There was no apparent threat to officer safety. Tellingly, Deputy Conley testified that, prior to opening the door to the shack, he did not feel threatened. If Mr. O'Dell had been elsewhere on the Hughes property, Defendants have failed to show that a search of the shack was "imperative" to officer safety. Moreover, the possibility that Mr. O'Dell was in the shack hiding but nobody else would have been in the shack was premised on the unreasonable belief that the shack was not a dwelling.

Defendants have failed to satisfy their burden in this regard. Rather than second-guess Deputy Conley's conduct with the benefit of the hindsight, the Court concludes only that Defendants have failed to demonstrate "specific and articulable facts" justifying a warrantless search of the shack based on any supposed exigency. Therefore, under the totality of the circumstances, the Court concludes that Deputy Conley's warrantless search was not reasonable pursuant to the exigent circumstances exception to the warrant requirement.

### e. Emergency Exception

"The need to protect or preserve life or avoid serious injury is one such justification for what would be otherwise illegal absent an exigency or emergency." *Snipe*, 515 F.3d at 950-51 (citation and internal quotation marks omitted). The Ninth Circuit has "adopt[ed] a two-pronged test that asks whether: (1) considering the totality of the circumstances, law

enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *Id.* at 952.

Similarly, Defendants argue that the "immediate need to protect" the officers themselves presented an emergency justifying the warrantless search of the shack. For the same reasons discussed above, the Court disagrees. There was no emergency to search the shack on the basis of officer safety, and Deputy Conley's search was therefore unreasonable.

Accordingly, Deputy Conley violated Mr. and Mrs. Mendez's constitutional right to free from an unreasonable search.

### f. Qualified Immunity

Defendants argue that Deputy Conley is entitled to qualified immunity in this regard because he was following orders from his superior, Sergeant Minster. But, "[c]ourts have widely held that a party's purported defense that he was 'just following orders' does not occup[y] a respected position in our jurisprudence." *Peralta v. Dillard*, 704 F.3d 1124, 1134 (9th Cir. 2013) (citations and internal quotation marks omitted). "Instead, officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy." *Id.* (citation and internal quotation marks omitted); *Dirks v. Grasso*, 449 F. App'x 589, 592 (9th Cir. 2011) ("[The defendants] cite no binding authority holding that following a superior's orders entitles officers to qualified immunity, and none exists.").

Preliminarily, it is not clear that Sergeant Minster ordered Deputy Conley (or Deputy Pederson) to search the shack. Regardless, the question is whether a reasonable officer could have believed that Deputy Conley's conduct was lawful.

Deputy Conley had information that people lived in the rear of the Hughes property. In addition, as discussed above, Deputy Conley observed (or should have observed) a number of objective indicia demonstrating that the shack was a separate dwelling unit. Moreover, Deputy Conley did not have a warrant to search the shack. And, under the totality of the circumstances, no reasonable officer could have believed that a warrantless search of the shack was justified under the exigency or emergency exceptions.

Rather, Deputy Conley opened the door (and pulled back the blanket) to a dwelling in which he knew—or should have known—people lived. Although Deputy Conley was searching for a parolee-at-large, the shack had a single doorway. If Mr. O'Dell had been within the shack, he would have been trapped. He could not have escaped. Regardless of whether Mr. O'Dell was within the shack, there was no apparent threat to officer safety. Deputy Conley himself did not feel threatened prior to opening the door to the shack.

Finally, Sergeant Minster did not tell the Deputies that the shack was not inhabited and did not specifically order them not to provide knock-notice (discussed below).

Every reasonable officer in Deputy Conley's position would have understood that what he was doing violated Mr. and Mrs. Mendez's right to be free from an unreasonable search. Accordingly, Mr. and

Mrs. Mendez's right to be free from an unreasonable search was clearly established in this case.

### 4. Manner of Entry

#### a. Knock-Notice

"The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one." *Hudson v. Michigan*, 547 U.S. 586, 589, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) (citation omitted). "Since 1917, when Congress passed the Espionage Act, this traditional protection has been part of federal statutory law and is currently codified at 18 U.S.C. § 3109." *Id.* (citation omitted). Finally, in *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995), the United States Supreme Court concluded that the "rule was also a command of the Fourth Amendment." *Id.* (citation omitted).

"The requirements of [the federal knock-and-announce statute] have been held to cover warrantless searches and entries of a home to make an arrest." William E. Ringel, *Searches and Seizures, Arrests and Confessions* § 6:7 n.2 (2d ed. 2013) (citing cases) (citing *United States v. Flores*, 540 F.2d 432, 436 (9th Cir. 1976) ("[A] warrantless entry normally requires the officer to give notice of his authority and purpose before using force to enter.")). Furthermore, the federal knock-and-announce statute requirements have been incorporated into the Fourth Amendment. *United States v. Valenzuela*, 596 F.2d 824, 830 (9th Cir. 1979).

As the Ninth Circuit has explained,

> The general practice of physically knocking on the door, announcing law enforcement's presence and purpose, and receiving an actual refusal or waiting a sufficient amount of time to infer refusal is the preferred method of entry. This method is preferable because it provides a clear rule that law enforcement can follow. It also promotes the goals of the knock and announce principle: protecting the sanctity of the home, preventing the unnecessary destruction of private property through forced entry, and avoiding violent confrontations that may occur if occupants of the home mistake law enforcement for intruders.

*United States v. Combs*, 394 F.3d 739, 744 (9th Cir. 2005) (citations omitted); *Richards v. Wisconsin*, 520 U.S. 385, 387, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997) ("[T]he Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry.").

There is no dispute that Sergeant Minster and Deputies Cox and Ramirez complied with the knock-notice requirement as to the Hughes residence. Here, however, the question is whether Deputies Conley and Pederson were required to knock-and-announce at the door of the shack itself.

As a general rule, law enforcement officers "are not required to [knock and announce] at each additional point of entry into structures within the curtilage." *United States v. Villanueva Magallon*, 43 F. App'x 16, 18 (9th Cir. 2002) (citations omitted); *see also United States v. Crawford*, 657 F.2d 1041, 1044

(9th Cir. 1981) ("There are no decisions directly on point dealing with [whether], after having complied with the dictates of [the federal knock-and-announce statute] at the front door, the arresting officers were then required to comply with [the statute] at the inner bedroom door. The Ninth Circuit has consistently held that where the first or contemporaneous entry is lawful under [the statute], a defendant cannot complain of the unlawfulness of subsequent entries.").

For example, the Ninth Circuit has "assumed for purposes of the [statutory] knock-and-announce rule . . . that a garage is part of a house." *United State v. Frazin*, 780 F.2d 1461, 1467 n. 6 (9th Cir. 1986); *Valenzuela*, 596 F.2d at 1365 ("[T]he garage entry was made only after the proper entry at the residence, and officers are not required to announce at [e]very place of entry; one proper announcement under [the federal knock-and-announce statute] is sufficient." (citation and internal quotation marks omitted)).

*Villanueva Magallon*, 43 F. App'x 16, is instructtive. In that case, the government had a warrant to search the premises at 792 Ada Street, Chula Vista, California ("792"). Another garage and house were on the same property—784 Ada Street, Chula Vista, California ("784"). Law enforcement officers entered both 792 and 784 and discovered drugs in the latter. *Id.* at 17. The Ninth Circuit rejected the defendant's argument that, "even if the warrant was valid, the agents did not knock and announce before they entered 784," remarking, "This boots him nothing," because it was "undisputed that the agents did knock and announce at 792." *Id.* at 18.

However, the Ninth Circuit also observed that, "[a]t any rate, nobody was in the house at 784, so [the defendant] cannot show any detriment from th[e] failure" to knock and announce before entering 784." *Id.* More importantly, the Ninth Circuit concluded that the defendant "possessed and controlled both 792 and 784 and, in fact, 784 was not being used as a separate residence by some third, innocent party." *Id.* at 17-18 (emphasis added) ("From the record, it is clear that 784 was within the curtilage of 792.").

Here, as discussed above, Deputies Conley and Pederson knew (or should have known) that the shack was a separate residence being used by third parties—*i.e.*, not Ms. Hughes. Deputies Conley and Pederson, however, did not knock-and-announce at the shack. Under *Cannon* and *Villanueva Magallon*, Deputies Conley and Pederson were required to knock-and-announce their presence at the door of the shack itself.

### b. No-Knock Entry Exceptions

The "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Wilson*, 514 U.S. at 929 ("[T]he method of an officer's entry into a dwelling [i]s among the factors to be considered in assessing the reasonableness of a search or seizure.").

"This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id.* at 934 ("[T]he common-law principle of announcement was never stated as

an inflexible rule requiring announcement under all circumstances.").

"*Wilson* and cases following it have noted the many situations in which it is not necessary to knock and announce." *Hudson*, 547 U.S. at 589 "It is not necessary when circumstances presen[t] a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile." *Id.* at 589-90 (citations and internal quotation marks omitted). "We require only that police have a reasonable suspicion . . . under the particular circumstances that one of these grounds for failing to knock and announce exists, and we have acknowledged that [t]his showing is not high." *Id.* at 590 (citation and internal quotation marks omitted) ("When the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do.").

"In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards*, 520 U.S. at 394. "This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries." *Id.* (citations omitted). "This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged." *Id.* at 394-95.

In this context, however, the Supreme Court has "treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones." *United States v. Banks*, 540 U.S. 31, 35, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003).

Moreover, where the "police claim exigent need to enter," the "crucial fact in examining their actions" is the "particular exigency claimed." *Id.* at 39.

The analysis here is similar to that above with respect to exigency/emergency. Defendants again argue that a no-knock entry was justified on the bases of effective apprehension of Mr. O'Dell and officer safety. But the shack had only a single doorway—anyone inside was trapped. And Deputy Conley testified that, prior to opening the door to the shack, he did not feel threatened—there was no apparent danger. If Mr. O'Dell was not within the shack, then there was no exigency for a no-knock entry.

Under the totality of the circumstances of this case, Defendants failed to introduce sufficient evidence that Deputies Conley and Pederson had a reasonable suspicion that knocking-and-announcing would have been dangerous or futile, or that it would have inhibited the effective apprehension of Mr. O'Dell. Given that the knock-and-announce requirement is part of the Fourth Amendment reasonableness inquiry, the Court cannot say that the failure to knock-and-announce in this case was reasonable.

Accordingly, Deputies Conley and Pederson violated Mr. and Mrs. Mendez's constitutional right to free from an unreasonable search based on the manner of entry.

### c. Qualified Immunity

Again, the determinative question is whether a reasonable officer could have believed that the conduct of Deputies Conley and Pederson was lawful. As discussed above, Deputies Conley and Pederson knew (or should have known) that the shack was a separate dwelling unit. Accordingly, a reasonable officer would have recognized the need to knock-and-announce his presence before searching the shack. Nor would a reasonable officer have believed that knocking-and-announcing would have been dangerous (Deputy Conley himself did not feel threatened before opening the shack door) or futile or would have inhibited effective apprehension of Mr. O'Dell (anyone inside could not have escaped). Indeed, Sergeant Minster recognized the need to provide knock-notice before a search of the main Hughes residence.

Every reasonable officer in Deputies Conley and Pederson's position would have understood that what they were doing violated that right. Accordingly, Mr. and Mrs. Mendez's right to be free from an unreasonable search—in the absence of Deputies Conley and Pederson's having knocked-and-announced their presence and provided Mr. and Mrs. Mendez with an opportunity to open the door to the shack—was clearly established in this case.

## C. Fourth Amendment: Excessive Force (At the Moment of Shooting)

### 1. Constitutional Violation

Mr. and Mrs. Mendez next argue that Deputies Conley and Pederson violated their Fourth Amendment right to be free from excessive force:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests'" against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

*Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (citations omitted).

As recently elaborated by the Ninth Circuit, the *Graham* factors (which are incorporated into the applicable Model Jury Instruction 9.22) "are not exclusive and we must consider the totality of the circumstances." *Gonzalez v. City of Anaheim*,—F.3d—2013 WL 1943326, at *2 (9th Cir. May 13, 2013). The second *Graham* factor, immediacy of the threat posed to other officers or civilians, is characterized as the most important factor. *Id.* at *3.

Courts are directed to give "careful attention to the facts and circumstances of each particular case" noting that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396 (citation omitted). Furthermore, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

The reasonableness inquiry is therefore highly fact specific and objective. *See Scott v. Harris*, 550 U.S. 372, 383, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) ("Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'"). "A reasonable use of deadly force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable." *Wilkinson v. Torres*, 610 F.3d 546,

551 (9th Cir. 2010) (citing *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)).

For example, in *Garcia v. Santa Clara County*, No. C 02-04360 RMW, 2004 WL 2203560 (N.D. Cal. Sept. 29, 2004), it was undisputed that defendant Deputy Dawson shot and killed the decedent (Mr. Garcia). *Id.* at *4. The district court granted the defendants' motion for summary judgment, concluding that "Dawson's use of deadly force was objectively reasonable" and therefore that "no constitutional violation occurred." *Id.* at *8. The evidence in that case established that "Dawson had probable cause to believe that Garcia posed a significant threat of death or serious physical injury to Dawson." *Id.* at *6. "First, Dawson observed that Garcia was in possession of a firearm. Second, Dawson saw Garcia pick up the gun, and begin to twist backwards towards Dawson, and move his arm holding the gun in Dawson's direction. Third, the events occurred during a foot pursuit in which Garcia was attempting to escape." *Id.*

Mr. and Mrs. Mendez do not dispute that Deputies Conley and Pederson's use of deadly force—at the moment of shooting—was objectively unreasonable under the totality of the circumstances. Indeed, in their closing argument, counsel for Mr. and Mrs. Mendez conceded that (again, at the time Deputy Conley opened the shack door) Deputies Conley and Pederson's use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives.

Mr. and Mrs. Mendez instead argue that Deputies Conley and Pederson violated the Fourth Amendment because they "created" the incident that led to the shooting. That argument is discussed below.

### 2. Qualified Immunity

Because Mr. and Mrs. Mendez have failed to prove a violation of their constitutional right to be free from excessive force in this regard, the Court need not reach the question of qualified immunity.

## D. Fourth Amendment: Excessive Force (Provocation)

Mr. and Mrs. Mendez's excessive force claim, indeed their entire theory of the case, is premised upon the law of Fourth Amendment provocation. In the Ninth Circuit, "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) (emphasis added); *Alexander v. City of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) ("[The] plaintiff argues that defendants used excessive force in creating the situation which caused [the decedent] to take the actions he did.").

The Ninth Circuit has explained this rule as follows:

> In *Alexander*, the officers allegedly used excessive force because they committed an independent Fourth Amendment violation by entering the man's house to arrest him without an arrest warrant, for a relatively trivial and non-violent offense, and this violation provoked the man to shoot at the officers. Thus, even though the officers reasonably fired back in self-defense, they could still be held liable for using excessive

force because their reckless and unconstitutional provocation created the need to use force.

[ . . . ]

*Alexander* must be read consistently with the Supreme Court's admonition in *Graham v. Connor* that courts must judge the "reasonableness of a particular use of force . . . from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." That goes for the events leading up to the shooting as well as the shooting. Our precedents do not forbid any consideration of events leading up to a shooting. But neither do they permit a plaintiff to establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.

[ . . . ]

But if, as in *Alexander*, an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise reasonable defensive use of force unreasonable as a matter of law. In such a case, the officer's initial unconstitutional provocation, which arises from intentional or reckless conduct rather than mere negligence, would proximately cause the subsequent application of deadly force.

*Billington*, 292 F.3d at 1189-91 (citations omitted) (emphasis added).

Reductively, an officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation.

**1. Predicate Constitutional Violation: Unreasonable Search**

For example, in *Federman v. County of Kern*, 61 F. App'x 438 (9th Cir. 2003), the Ninth Circuit concluded that the defendants' illegal entry was (1) a constitutional violation, (2) reckless, and (3) not protected by qualified immunity. Specifically,

> [the] plaintiffs ha[d] alleged constitutional violations: the threshold inquiry under *Saucier*. The Sheriff department's alleged reckless entry of [the decedent]'s home with a SWAT team constitutes excessive force under the Fourth Amendment. This aggressive entry without warning or a warrant, to detain [the decedent] for psychiatric examination due to his odd but relatively trivial, non-criminal behavior, provoked [the decedent] to resist and turned a relatively minor situation into a fatal shooting. No reasonable police officer could have believed that he was entitled to make such an entry.

*Id.* at 440 (citation omitted) (affirming, on interlocutory appeal, the district court's judgment denying qualified immunity to the individual defendants on the plaintiffs' excessive force claims).

Similarly, *Espinosa v. City of San Francisco*, 598 F.3d 528 (9th Cir. 2010), involved an illegal entry. *Id.* at 533. The Ninth Circuit concluded that the district court "properly denied defendants' summary judgment motion on whether the officers were entitled to qualified immunity for allegedly violating [the decedent]'s Fourth Amendment rights by intentionally or recklessly provoking a confrontation." *Id.* at 538. The Ninth Circuit concluded that, "[v]iewing the evidence in the light most favorable to the plaintiffs, there is evidence that the illegal entry created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable." *Id.* at 539 (emphasis added) (citing *Alexander*) ("If an officer intentionally or recklessly violates a suspect's constitutional rights, then the violation may be a provocation creating a situation in which force was necessary and such force would have been legal but for the initial violation.").

As discussed above, Deputy Conley violated Mr. and Mrs. Mendez's Fourth Amendment right to be free from an unreasonable search in searching the shack without a warrant (or applicable warrant exception). Deputies Conley and Pederson violated Mr. and Mrs. Mendez's Fourth Amendment right to be free from an unreasonable search in and in failing to knock-and-announce before the search. As a result, Mr. Mendez picked up the BB gun rifle while sitting up on the futon within the shack, and Deputies Conley and Pederson fired their guns.

Under *Billington*, Deputies Conley and Pederson's predicate constitutional violations "provoked" Mr. Mendez's response, which in turn

resulted in Deputies Conley and Pederson's subsequent use of force.

### 2. Intentional or Reckless Provocation

Mr. and Mrs. Mendez do not argue that Deputy Conley or, for that matter, Deputy Pederson intentionally provoked the violent response from Mr. Mendez.

With respect to "reckless" provocation, the Ninth Circuit in *Billington* stated, "We read *Alexander*, as limited by [*Duran v. City of Maywood*, 221 F.3d 1127 (9th Cir. 2000)], to hold that where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." 292 F.3d at 1189 (emphasis added). However, the Ninth Circuit's opinion in *Alexander* does not use the word "reckless" or any derivative thereof. *See* 29 F.3d 1355.

Furthermore, the Ninth Circuit's opinion in *Duran* uses the word "reckless" (and any derivative thereof) only once:

> The Plaintiffs' first argument is that the district court erred when it refused to give an *Alexander* instruction. This instruction is based on the case of [*Alexander*], and applies when there is evidence that a police officer's use of excessive and unreasonable force caused an escalation of events that led to the plaintiff's injury. Here, the Plaintiffs claim that this instruction should have been given because the manner in which the two

> officers approached the Duran residence "virtually assured a police shooting." Specifically, they point to the fact that the officers walked up the driveway with their guns drawn and never announced their presence. The Plaintiffs claim that this "stealth" approach "raised the likelihood" that "whomever they surprised would point a gun at them."
>
> Accordingly, they argue the district court erred when it refused to give the *Alexander* instruction . . . .
>
> Plaintiffs proposed instruction reads as follows: "If you find that [the defendant officer] recklessly, intentionally and/or unreasonably created a situation where the accidental or purposeful use of deadly force upon [the decedent] would become likely, such conduct would be a violation of [the decedent]'s Fourth Amendment right to be free from unreasonable seizures."

221 F.3d at 1130-31 & n.1 (emphasis added). Instead, the Ninth Circuit explained the relevant standard as follows:

> In order to justify an *Alexander* instruction, there must be evidence to show that the officer's actions were excessive and unreasonable, and that these actions caused an escalation that led to the shooting. Here, no such facts exist. The two uniformed officers simply walked up a driveway silently with their guns drawn. Contrary to the Plaintiffs' assertions, nothing about

> these actions should have provoked an armed response. As a result, the district court did not abuse its discretion in denying the Plaintiffs' request to give an *Alexander* instruction.

*Id.* at 1131 (emphasis added).

Returning to the Ninth Circuit's opinion in *Billington*,

> *Alexander*'s requirement that the provocation be either intentional or reckless must be kept within the Fourth Amendment's objective reasonableness standard. The basis of liability for the subsequent use of force is the initial constitutional violation, which must be established under the Fourth Amendment's reasonableness standard. Thus, if a police officer's conduct provokes a violent response, as in *Duran*, but is objectively reasonable under the Fourth Amendment, the officer cannot be held liable for the consequences of that provocation regardless of the officer's subjective intent or motive. But if an officer's provocative actions are objectively unreasonable under the Fourth Amendment, as in *Alexander*, liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused.
>
> [ . . . ]
>
> Under *Alexander*, the fact that an officer negligently gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself. The

> Fourth Amendment's "reasonableness" standard is not the same as the standard of "reasonable care" under tort law, and negligent acts do not incur constitutional liability. An officer may fail to exercise "reasonable care" as a matter of tort law yet still be a constitutionally "reasonable" officer. Thus, even if an officer negligently provokes a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation.

292 F.3d at 1190 (emphasis added).

Therefore, for purposes of *Billington* provocation, the Ninth Circuit equates "reckless" (and intentional) conduct with conduct that is unreasonable under the Fourth Amendment. In this regard, such "reckless" conduct is distinguished from "bad tactics" and conduct that is merely negligent as a matter of tort law.

For liability to attach under *Billington*, such "reckless" conduct need only be unreasonable under the Fourth Amendment. Specifically, "reckless" conduct for purposes of *Billington* provocation need not be "reckless" as a matter of tort law, so long as it is unreasonable under the Fourth Amendment. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 2 ("A person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution

a demonstration of the person's indifference to the risk.").

The Ninth Circuit's opinion in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), confirms this understanding of the rule. In *Glenn*, the police confronted the decedent outside of his home. *Id.* at 867-68. An officer fired several beanbag rounds from a shotgun, which struck the decedent. *Id.* at 869. After the decedent was hit with the beanbag rounds, he began moving toward the house. *Id.* Because the decedent's parents were inside the house (and potentially threatened by the movement), two other officers then fired their semiautomatic weapons, killing the decedent. *Id.*

After quoting the general rule from *Billington* ("[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."), the Ninth Circuit concluded as follows:

> Because there is a triable issue of whether shooting [the decedent] with the beanbag shotgun was itself excessive force, under *Billington* there is also a question regarding the subsequent use of deadly force. Even assuming, as the district court concluded, that deadly force was a reasonable response to [the decedent's] movement toward the house, a jury could find that the beanbag shots provoked [the decedent's] movement and thereby precipitated the use of lethal force. <u>If jurors conclude that the provocation—the use of the beanbag shotgun—was an independent Fourth Amendment violation,</u>

> the officers "may be held liable for [their] otherwise defensive use of deadly force."

*Id.* at 879 (citing *Billington*) (emphasis added) (reversing the district's ruling on summary judgment that the officers' use of force did not violate the decedent's Fourth Amendment rights).

In *Glenn*, the determinative question under *Billington* clearly was only whether there had been a predicate violation of the Fourth Amendment. Notwithstanding the general rule statement, the Ninth Circuit did not require a separate showing that the officers' conduct was "reckless" as a matter of tort law, or in any way other than under the Fourth Amendment's reasonableness standard.

Consequently, the Court need not conclude that Deputies Conley and Pederson's predicate constitutional violations were "reckless" as a matter of tort law (or otherwise). Under *Billington* and its progeny, it is sufficient that this conduct was unreasonable under the Fourth Amendment and provoked a violent confrontation in which Deputies Conley and Pederson used deadly force.

Defendants argue that "there is no liability under *Alexander* where defendants' conduct was undeserving of a violent response." (Docket No. 242 at 3 (emphasis in original)). But the Ninth Circuit has indicated that the predicate constitutional violation (here, illegal entry) need not be menacing or "provocative" in the sense of inciting a violent response. Rather, for purposes of *Billington/Alexander* provocation, it is sufficient that the predicate constitutional violation "created the need to use force"

(*Billington*) or "created a situation which led to the shooting" (*Espinosa*).

*Glenn*, 673 F.3d 864, is in accord. In that case, the defendant officers did not act "provocatively" or menacingly or in a way that necessarily "deserved" a violent response. Indeed, the decedent did not react violently. Yet the Ninth Circuit concluded that the theory of *Billington/Alexander* provocation applied based on the (potential) predicate excessive force violation.

Nor is Defendants' reliance on *Duran*, 221 F.3d 1127, persuasive in this regard. In *Duran*, the Ninth Circuit provided the following background:

> At approximately 6:30 a.m., on August 15, 1994, Officer Curiel and Officer William Wallace responded to a dispatch call regarding loud music and shots fired in the vicinity of 52nd and Carmelita Street in the City of Maywood. When the officers arrived at the location, they heard music coming from inside the Duran's garage. The officers pulled out their firearms and silently walked up the driveway toward the source of the music.
>
> As they approached, the officers heard the sound of a person racking a pistol. Immediately upon hearing this sound, Officer Wallace yelled to his partner, "He just racked one." At the same moment, Officer Curiel saw Eloy Duran emerge from behind a pickup truck in the garage holding a weapon. Officer Curiel testified that he shouted in Spanish, "Police, drop the gun,"

> but Duran ignored Officer Curiel's command and pointed his weapon at the officers. Officer Curiel then fired four shots at Duran, causing him to fall to the floor. When Office Curiel approached Duran to disarm him, Duran pointed the gun at him. Officer Curiel stated that he shouted loudly, "Don't, don't, don't." When Duran failed to respond, Officer Curiel fired two more rounds into Duran's chest. At this point, Duran stopped moving and Officer Curiel removed the gun.

*Id.* at 1129-30 ("In order to justify an *Alexander* instruction, there must be evidence to show that the officer's actions were excessive and unreasonable, and that these actions caused an escalation that led to the shooting.").

On the *Alexander* issue, the Ninth Circuit stated as follows:

> Contrary to the Plaintiffs' assertions, the officers did not make a "stealth" approach. Officer Curiel testified that he and Officer Wallace arrived at the scene in marked police cars and that both men were wearing police uniforms. They testified further that he and Wallace met on the sidewalk in front of the Duran's residence and walked, side-by-side, up the driveway toward the music in the garage. Although Plaintiffs are correct in pointing out that the officers had their guns drawn and did not announce their presence, these actions were entirely reasonable given that they were responding to a call that shots had been fired.

*Id.* at 1131 (concluding that the "district court did not abuse its discretion in denying the Plaintiffs' request to give an *Alexander* instruction.").

Arguably, this reasoning could be read to indicate that the district court rightly denied the *Alexander* instruction because the officers' conduct was "undeserving" of a violent—*i.e.*, not menacing or incitingly provocative—and therefore not "excessive" or "unreasonable" or "intentional or reckless" under *Alexander*.

However, the Court understands this reasoning to indicate that the district court rightly denied the *Alexander* instruction because there was no evidence of a predicate constitutional violation—*i.e.*, the officers' conduct was reasonable under the Fourth Amendment and therefore not "excessive" or "unreasonable" or "intentional or reckless" under *Alexander*.

Similarly, *Duran* can be distinguished on its facts. For example, in this case, with respect to the shack if not the Hughes residence, Deputies Conley and Pederson arguably did make a "stealth" approach.

Defendants also argue that there was no violent confrontation based on Plaintiffs' own theory of the case (*i.e.*, Mr. Mendez simply was moving the BB run to sit up). Again, *Glenn* suggests otherwise—the decedent in that case did not react violently or in a confrontational manner.

Accordingly, Deputies Conley and Pederson violated Mr. and Mrs. Mendez's right to be free from excessive force under a theory of *Billington* provocation. The predicate (unreasonable search) constitutional violations render their "otherwise reasonable defensive use of force unreasonable as a matter of law."

The Court recognizes that Deputy Pederson did not technically search the shack, as discussed above. Nevertheless, the Court concludes that Deputy Pederson is liable under *Billington* for two reasons. First, there is no indication in the case law that only the officer who commits the predicate constitutional violation should be held liable for the subsequent use of deadly force. Tellingly, in *Glenn*, one officer shot the decedent with the beanbag rounds (the predicate violation), and two different officers killed the decedent (the subsequent use of deadly force).

Second, as discussed above, Deputy Pederson (as well as Deputy Conley) violated Mr. and Mrs. Mendez's right to be free from an unreasonable search in the absence of a proper knock-and-announce—itself a predicate constitutional violation that directly provoked the violent confrontation and subsequent use of deadly force. If the Deputies had announced themselves, then this tragedy would never have occurred.

Third, even if "reckless" were construed in its traditional tort sense and "undeserved" meant what Defendants contend, the Court's ruling would be the same. As discussed below, the multiple indicia of residency—including being told that someone lived on the property—means that the conduct rose beyond even gross negligence. And it is inevitable that a startling armed intrusion into the bedroom of an innocent third party, with no warrant or notice, will incite an armed response. Any other ruling would be inconsistent with the Second Amendment, as discussed below.

### 3. Qualified Immunity

Again, the question is whether a reasonable officer could have believed that the conduct of Deputies Conley and Pederson was lawful. As in *Federman* and *Espinosa*, Deputies Conley and Pederson's unreasonable search and manner of entry constituted the predicate, provocative constitutional violation that renders their subsequent use of force unreasonable as a matter of law. For the reasons discussed above, all of Mr. and Mrs. Mendez's rights in this regard were clearly established. Every reasonable officer in Deputies Conley and Pederson's position would have understood that what they were doing violated those rights.

In particular, both during trial and in the briefs following testimony, Deputies Conley and Pederson claim their actions were reasonable because they reasonably did not perceive the shack to be inhabited or, indeed, habitable. Based on the Court's Findings of Fact, their perception was unreasonable. Had this mistake of fact been reasonable, then there would have been no liability.

### 4. Actual and Proximate Causation

A plaintiff must prove that the defendant's "actions were both the actual and the proximate cause" of the plaintiff's injury. *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990); *see Billington*, 292 F.3d at 1190 ("[I]f an officer's provocative actions are objectively unreasonable under the Fourth Amendment, as in *Alexander*, liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused." (emphasis added)).

A defendant's conduct is an actual cause of the plaintiff's injury "only if the injury would not have occurred 'but for' that conduct. *White*, 901 F.2d at 1506 (citation omitted). Mr. and Mrs. Mendez would not have been injured but for Deputies Conley and Pederson's intrusion into the shack. Therefore, the conduct of Deputies Conley and Pederson was an actual cause of Mr. and Mrs. Mendez's injuries.

Furthermore, the "requirement of actual cause is a 'rule of exclusion.' Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury." *Id.* (citation and internal quotation marks omitted). "This question is generally referred to as one of proximate cause." *Id.*

A defendant's conduct is not a proximate cause of the plaintiff's injury "if another cause intervenes and supersedes his liability for the subsequent events." *Id.* (citation omitted). Importantly, whether a plaintiff's own conduct, as an intervening cause of his injury, supersedes the defendant's liability for the results of his own conduct "depends upon what was reasonably foreseeable to [the defendant] at the time." *Id.*

"The courts are quite generally agreed that [foreseeable] intervening causes . . . will not supersede the defendant's responsibility." *Id.* (citation and internal quotation marks omitted). "Courts look to the original foreseeable risk that the defendant created. When one person's conduct threatens another, the normal efforts of the other . . . to avert the threatened harm are not a superseding cause of harm resulting from such efforts, so as to prevent the

first person from being liable for that harm." *Id.* (citations and internal quotation marks omitted).

Here, Justice Jackson's concurring opinion in *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948), is informative. In *McDonald*, the defendant rented a room in a residence that the landlady operated as a rooming house. *Id.* at 452. The defendant had been under police surveillance based on suspicion that he was running a "numbers game." *Id.* On the day of the defendant's arrest three police officers surrounded the house during the midafternoon. The officers did not have a warrant for arrest nor a search warrant. One of the officers thought that he heard an adding machine, which frequently was used in numbers games. *Id.* Believing that the numbers game was in process, one of the officers opened a window leading into the landlady's room and climbed through. *Id.* at 452-53. He identified himself and then let the other officers into the house. *Id.* at 453. The officers arrested the defendant in an end bedroom on the second floor. *Id.*

According to Justice Jackson,

> When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.
>
> . . . the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than

> to foresight. Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.

*Id.* at 460-61 (Jackson, J., concurring).

As Justice Jackson foretold, a foreseeable risk of an unreasonable search is that the offending officers will be threatened by the resident. Indeed, this is one of the bases for the knock-and-announce rule. *See United States v. Combs*, 394 F.3d 739, 744 (9th Cir. 2005) ("protecting the sanctity of the home, preventing the unnecessary destruction of private property through forced entry, and avoiding violent confrontations that may occur if occupants of the home mistake law enforcement for intruders.").

In this case, it was foreseeable that opening the door to the shack without a warrant (or warrant exception) and without knocking-and-announcing could lead to a violent confrontation. Mr. Mendez's "normal efforts" in picking up the BB gun rifle to sit up on the futon do not supersede Deputies Conley and Pederson's responsibility. Therefore, the conduct

of Deputies Conley and Pederson was the proximate cause of Mr. and Mrs. Mendez's injuries.

This conclusion is consistent with the tenet that the "Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 628, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) ("[T]he need for defense of self, family, and property is most acute" in the home). Americans own firearms for many reasons, including hunting, sport and collecting, but one of the main reasons is to protect their own homes. A startling entry into a bedroom will result in tragedy.

## E. Liability

### 1. Personal Liability

An officer only can be held liable for his or her "'integral participation' in the unlawful conduct." *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996) (Section 1983 does not "allow group liability in and of itself without individual participation in the unlawful conduct").

However, "'integral participation' does not require that each officer's actions themselves rise to the level of a constitutional violation." *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004); *see also Hernandez v. City of Napa*, No. C-09-02782 EDL, 2010 WL 4010030, at *11 (N.D. Cal. Oct. 13, 2010) (the "integral participant" rule "extends liability to those actors who were integral participants in the constitutional

violation, even if they did not directly engage in the unconstitutional conduct themselves").

Moreover, in a situation where "each defendant might have committed an act that is a tort when injury results (for there is no tort without an injury), but it is unclear which defendant's act was the one that inflicted the injury—both shot at the plaintiff, one missed, but we do not know which one missed. . . . both are jointly and severally liable." *Richman v. Sheahan*, 512 F.3d 876, 884 (7th Cir. 2008) (citing *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948)) (discussing liability for excessive force under the Fourth Amendment).

Here, Deputy Conley is liable for unreasonably searching the shack without a warrant or applicable warrant exception. Deputies Conley and Pederson are jointly and severally liable for unreasonably failing to knock-and-announce their presence.

On the provocation claim, there is no evidence as to which bullet(s) caused each injury. Deputies Conley and Pederson are jointly and severally liable for unreasonable, excessive force under a theory of *Billington* provocation.

### 2. Vicarious Liability

"A municipality or other local government may be liable under [Section 1983] if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation. But, under § 1983, local governments are responsible only for 'their own illegal acts.' They are not vicariously liable under § 1983 for their

employees' actions." *Connick v. Thompson*, 131 S. Ct. 1350, 1359, 179 L. Ed. 2d 417 (2011) (citations omitted).

In this case, there is no direct claim for liability under Section 1983 against COLA. Nor can COLA be held vicariously liable under Section 1983 for the wrongful conduct of Deputies Conley and Pederson. This formal lack of liability is not meant to undermine the legal obligation of COLA to pay the forthcoming judgment.

## F. Damages

The "basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 254, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978). "[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 306, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) (citations omitted).

"[N]o compensatory damages may be awarded in a § 1983 suit absent proof of actual injury." *Farrar v. Hobby*, 506 U.S. 103, 112, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (citation omitted). However, the "law of this circuit entitles a plaintiff to an award of nominal damages if the defendant violated the plaintiff's constitutional right, without a privilege or immunity, even if the plaintiff suffered no actual damage." *Wilks v. Reyes*, 5 F.3d 412, 416 (9th Cir. 1993).

In awarding non-economic damages, the Court awarded an amount for Mr. Mendez that is sufficient—

if invested prudently and not squandered—to raise his family in dignified circumstances. The gist of Mr. Mendez's testimony was that the loss of his leg caused a loss of dignity and self-sufficiency. In awarding non-economic damages to Mrs. Mendez, the Court is mindful that she was pregnant at the time she was shot.

## G. State Law Claims

As noted above, Mr. and Mrs. Mendez also allege various tort claims under California law.

### 1. Assault and Battery

Under California law, battery claims for excessive force by a law enforcement official are governed by the same reasonableness standard of the Fourth Amendment. *See Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272-74, 74 Cal. Rptr. 2d 614 (1998) ("By definition then, a *prima facie* battery is not established unless and until plaintiff proves unreasonable force was used."); *see also* CACI 1305, Battery by Peace Officer; *Evans v. City of San Diego*, —F. Supp. 2d—, 2012 WL 6625286, at *9 (S.D. Cal. Dec. 19, 2012) ("Plaintiff's [claim] for assault and battery flows from the same facts as her Fourth Amendment excessive force claim, and is measured by the same reasonableness standard of the Fourth Amendment.").

For the reasons discussed above, Deputies Conley and Pederson's use of force, at the moment of shooting, was objectively reasonable. Accordingly, Mr. and Mrs. Mendez's claim for assault and battery fails. In addition, the Court notes that there appears to be no basis under California law to apply a theory

of *Billington* provocation to an assault and battery claim.

### 2. Negligence

Likewise, under California law "negligence is measured by the same standard as battery and excessive use of force under the Fourt[h] Amendment." *Morales v. City of Delano*, 852 F. Supp. 2d 1253, 1278 (E.D. Cal. 2012); *McCloskey v. Courtnier*, No. C 05-4641 MMC, 2012 WL 646219, at *3 (N.D. Cal. Feb. 28, 2012) (same) (citing cases).

For the reasons discussed above, Deputies Conley and Pederson's use of force, at the moment of shooting, was objectively reasonable. Accordingly, Mr. and Mrs. Mendez's claim for negligence fails—in this respect.

However, whether California law recognizes an analogue to *Billington* provocation under a theory of negligence is an open question. Importantly, in *Hayes v. County of San Diego*, 658 F.3d 867 (9th Cir. 2011), the Ninth Circuit certified to the California Supreme Court a question relating to "deputies' preshooting conduct in the context of the claim to negligent wrongful death." *Id.* at 869 ("[W]e request that the California Supreme Court answer the following question: Whether under California negligence law, sheriff's deputies owe a duty of care to a suicidal person when preparing, approaching, and performing a welfare check on him.").

For example, in *Hayes* the Ninth Circuit discussed the California Supreme Court's decision in *Hernandez v. City of Pomona*, 46 Cal.4th 501, 94 Cal. Rptr. 3d 1 (2009):

In *Hernandez*, the court granted review to consider the following question: "When a federal court enters judgment in favor of the defendants in a civil rights claim brought under 42 United States Code section 1983 . . ., in which the plaintiffs seek damages for police use of deadly and constitutionally excessive force in pursuing a suspect, and the court then dismisses a supplemental state law wrongful death claim arising out of the same incident, what, if any, preclusive effect does the judgment have in a subsequent state court wrongful death action?" The court held "that on the record and conceded facts here, the federal judgment collaterally estops plaintiffs from pursuing their wrongful death claim, even on the theory that the officers' preshooting conduct was negligent."

In doing so, the California Supreme Court did not hold that law enforcement officers owed no duty of care in regards to pre-shooting conduct, as the [California] lower courts . . . had. Instead, the court found that the officers' specific preshooting conduct did not breach applicable standards of care. In light of this conclusion, the court in *Hernandez* declined to address the officers' claim that "they owed no duty of care regarding their preshooting conduct."

The court's extended analysis of whether the officers' preshooting conduct breached the relevant standard of care indicated, however, that it would likely not adopt the broad rule from [the California lower courts]

> that officers owe no such duty. Indeed, in a concurring opinion, Justice Moreno argued that the court should not have reached the issue "because plaintiffs are entitled to amend their complaint to allege preshooting negligence." The majority responded, stating "we find that plaintiffs have adequately shown how they would amend their complaint to allege a preshooting negligence claim, and that we must determine whether any of the preshooting acts plaintiffs have identified can support negligence liability."
>
> There is disagreement within this court as to whether this discussion in *Hernandez* suggests that the California Supreme Court would not follow the holdings in [the California lower courts] . . . .

*Id.* at 872 (citations omitted).

In the absence of clear direction from the California Supreme Court, the Court concludes that California law does not provide for an analogue to *Billington* provocation under a theory of negligence. Furthermore, the Court believes that the answer to the certified question in *Hayes* is unlikely to resolve this question as it would bear on this case. Accordingly, Mr. and Mrs. Mendez's claim for negligence fails.

However, after the California Supreme Court decides the certified question in *Hayes*, this Court will review that decision. As appropriate, and on its own motion, the Court will alter or amend the judgment in this case pursuant to Rule 59(e).

### 3. Intentional Infliction of Emotional Distress ("IIED")

Under California law, the "elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendants with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Campos v. City of Merced*, 709 F. Supp. 2d 944, 965 (E.D. Cal. 2010) (citing *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001, 25 Cal. Rptr. 2d 550 (1993) (citation omitted). "For conduct to be extreme and outrageous, it must be 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" *Id.* at 965-66(citing *Potter*, 6 Cal. 4th at 1001).

"In order to establish the second element, a plaintiff must show the conduct was especially calculated to cause severe mental distress." *Mitan v. Feeney*, 497 F. Supp. 2d 1113, 1126 (C.D. Cal. 2007) (citing *Ochoa v. Superior Court*, 39 Cal. 3d 159, 216 Cal. Rptr. 661 (1985)); *Ochoa*, 39 Cal. 3d at 165 n.5 (Under California law, "the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind" (emphasis in original)).

Although the totality of Deputies Conley and Pederson's conduct was reckless as a matter of tort law, there is no evidence that their conduct was calculated to cause mental distress, and the actual

decision to shoot was, by itself, justified. Mr. and Mrs. Mendez's IIED claim fails.

## III. VERDICT

In favor of Plaintiffs Mr. and Mrs. Mendez and against Defendants Deputies Conley and Pederson.

On the Fourth Amendment unreasonable search claim (based on warrantless entry, the Court awards Mr. and Mrs. Mendez $1.00 in nominal damages. As discussed above, only Deputy Conley is liable on this claim.

On the Fourth Amendment unreasonable search claim (based on failure to knock-and-announce), the Court awards Mr. and Mrs. Mendez $1.00 in nominal damages. As discussed above, Deputies Conley and Pederson are jointly and severally liable on this claim.

On the Fourth Amendment excessive force claim (based on conduct at the moment of shooting), the Court rules in favor of Deputies Conley and Pederson.

On the Fourth Amendment excessive force claim (based on *Alexander/Billington* provocation), as discussed above, Deputies Conley and Pederson are jointly and severally liable. On this claim, the Court awards the following damages:

**Plaintiff Angel Mendez**

| | |
|---|---|
| Past Medical Bills: | $721,056 |
| Future Medical Care: | |
| Prosthesis upkeep and replacement: | $407,000 |
| Future surgeries: | $45,000 |

| | |
|---|---|
| Psychological care (5 years): | $13,300 |
| Attendant Care (4 hours/day at $12.00/hour) | $648,240 |
| Loss of Earnings: | $241,920 |
| Non-Economic Damages: | $1,800,000 |
| Total: | $3,876,516 |
| **Plaintiff Jennifer Lynn Garcia** | |
| Past Medical Bills: | $95,182 |
| Future Medical Care: | $37,000 |
| Non-Economic Damages: | $90,000 |
| Total: | $222,182 |

On the California tort claims, the Court finds in favor of Deputies Conley and Pederson.

The Court will enter a separate judgment pursuant to Federal Rule of Civil Procedure 54 and 58(b).

/s/ Michael W. Fitzgerald
United States District Court
Judge

Dated: August 13, 2013

## ORDER OF THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (JUNE 23, 2016)

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ANGEL MENDEZ and
JENNIFER LYNN GARCIA,

*Plaintiffs-Appellees*,

v.

COUNTY OF LOS ANGELES and COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

*Defendants*,

and

CHRISTOPHER CONLEY, Deputy
and JENNIFER PEDERSON,

*Defendants-Appellants*.

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No. 13-56686, 13-57072

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

Before: GOULD and BERZON, Circuit Judges, and STEEH,* Senior District Judge.

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Appellants' Petition for Panel Rehearing is DENIED. The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellants' Petition for Rehearing En Banc is DENIED.

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* The Honorable George Caram Steeh III, Senior District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

## ORDER OF THE NINTH CIRCUIT (APRIL 22, 2016)

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ANGEL MENDEZ and JENNIFER LYNN GARCIA,

*Plaintiffs-Appellees*,

v.

COUNTY OF LOS ANGELES and COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

*Defendants*,

and

CHRISTOPHER CONLEY, Deputy and JENNIFER PEDERSON,

*Defendants-Appellants*.

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No. 13-56686

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

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ANGEL MENDEZ; JENNIFER LYNN GARCIA,

*Plaintiffs-Appellants*,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

*Defendants*,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

*Defendants-Appellees*.

---

No. 13-57072

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

Before: GOULD and BERZON, Circuit Judges, and STEEH,* Senior District Judge.

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Plaintiffs-Appellees are ordered to file a response to Defendants-Appellants' Petition for Panel Rehearing or Rehearing En Banc. The response is not to exceed 20 pages, and must be filed no later than 21 days from the date of this order.

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* The Honorable George Caram Steeh III, Senior District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

## ORDER OF THE NINTH CIRCUIT (MARCH 15, 2016)

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ANGEL MENDEZ; JENNIFER LYNN GARCIA,

*Plaintiffs-Appellees*,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

*Defendants*,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

*Defendants-Appellants*.

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No. 13-56686

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

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ANGEL MENDEZ; JENNIFER LYNN GARCIA,

*Plaintiffs-Appellants*,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

*Defendants*,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

*Defendants-Appellees*.

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No. 13-57072

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

Before: GOULD and BERZON, Circuit Judges, and STEEH,* Senior District Judge.

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Defendants-Appellants' Motion For 30-Day Extension of Time to File Petition For Rehearing By Panel and/or En Banc and Stay of Mandate is GRANTED.

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* The Honorable George Caram Steeh III, Senior District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.